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2613

No. 12425

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER L. PENDERS and
FLORA PENDERS,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12425

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,
Attorney for Defendant and Cross-Complainant and Appellant.

ROBERT E. HALSING,
703 Market Street,
San Francisco, California.

EUGENE H. O'DONNELL,
785 Market Street,
San Francisco, California.
Attorneys for Plaintiffs and Cross-Defendants and Appellees.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27202 H

WALTER L. PENDERS and FLORA PENDERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES UNDER FEDERAL TORT CLAIMS ACT

Plaintiffs above named and each of them complain of the United States of America, a sovereign power, and First Doe and Second Doe, defendants herein, and for causes of action allege:

First Cause of Action

Plaintiff Walter L. Penders complains of said defendants and each of them and for cause of action alleges:

I.

This action is brought under the Federal Tort Claims Act of the Legislative Reorganization Act of 1946, Public Law 601, Seventy-ninth Congress, approved August 2, 1946, Public Law 601, and is for a claim against the United States of America for money only, accruing on May 11, 1946, on ac-

count of personal injuries, damage to and loss of property, caused by the negligent act or omission of defendants First Doe and Second Doe, employees of the defendant United States of America, while acting within the scope of their employment.

II.

That the true names of the defendants sued herein under the fictitious names of First Doe and Second Doe are unknown to plaintiffs, and plaintiffs pray leave, upon ascertaining the true names of said defendants, to amend this complaint to insert their said true names.

III.

Plaintiffs have at all times herein mentioned borne true allegiance to the Government of the United States of America and have in no way given encouragement to rebellion against the Government of the United States of America or at any time aided or abetted in any manner or given comfort to any sovereign government at war with the United States of America.

IV.

At all times herein mentioned plaintiffs have been and now are citizens of the United States of America and residents of the City of Pacific Grove, County of Monterey, State of California, residing at 208 Alder Street, Pacific Grove, California.

V.

That at all times mentioned herein Fremont

Street and Park Avenue were and now are public streets and highways situated in the County of Monterey, State of California.

VI.

That at all times herein mentioned First Doe was an employee of the United States Government, to wit, a member of the United States Army, and was acting in line of duty and within the scope of his employment under the Commanding General, Ninth Service Command, located at Fort Ord, California.

VII.

That on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff Walter L. Penders, with plaintiff Flora Penders as a passenger therein, was driving a 1945 Hupmobile Sedan automobile, then and there owned by said plaintiff Walter L. Penders, in an easterly direction on said Fremont Street and was turning said automobile at right angles northerly into said Park Avenue at the intersection of said Fremont Street with said Park Avenue; that at said time and place said defendant First Doe, acting as the agent, servant and employee of the other said defendant, the United States of America, and acting within the course and scope of his authority and employment as such agent, servant and employee, and with the knowledge, permission and consent of the said defendant the United States of

America, was operating and controlling a United States Army five-passenger Sedan automobile in a westerly direction on said Fremont Street; that at said time and place, and while the said car of plaintiff Walter L. Penders was turning as aforesaid, defendant First Doe so carelessly and negligently operated and controlled said United States Army Sedan automobile that the same was caused to and did collide with and strike the said 1945 Hupmobile Sedan automobile of said plaintiff Walter L. Penders with great force and violence.

VIII.

That said collision caused said plaintiff Walter L. Penders to be and he was cut, bruised, lacerated, shocked and injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: Comminuted fracture, left wrist, lower end of radius, with slight mushrooming of fragments. Oblique fracture, head of tibia. Contusion, abrasions, hands, trunk and lower extremities. Shock, trauma. Said plaintiff has incurred indebtedness for ambulances, nursing care, medical care and attention, hospitalization, X-Rays and physician's services reasonable necessary and required to treat his said injuries in the amount of Three Thousand Six Hundred and Sixty and 51/100 ($3,660.51) Dollars; that because of the collision caused as aforesaid and as the proximate result of said collision, plaintiff's 1945 Hupmobile Se-

dan automobile was damaged; that said automobile was of a value in excess of $2,750.00; that said automobile was sold for salvage for the sum of $135.00; that said plaintiff, because of the damage to said automobile, has suffered further special damage in the sum of Two Thousand Six Hundred and Fifteen ($2,615.00) Dollars.

IX.

That by reason of all and singular the premises aforesaid plaintiff Walter L. Penders has suffered general damages in the sum of Twenty Thousand ($20,000.00) Dollars, together with special damages in the amount of Six Thousand Two Hundred and Seventy-five and 51/100 ($6,275.51) Dollars.

Second Cause of Action

As and for a second, separate and distinct cause of action plaintiff Flora Penders complains of defendants and each of them and for cause of action alleges:

I.

That she is the wife of the above-named plaintiff Walter L. Penders.

II.

That she incorporates herein each, every, all and singular, generally and specifically, the allegations contained in Paragraphs I, II, III, IV, V, VI, and VII of the First Cause of Action of

plaintiff Walter L. Penders, as though fully set forth herein.

III.

That said collision caused plaintiff Flora Penders to be and she was cut, bruised, lacerated, shocked and injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: Comminuted fracture, femur, extending into knee joint; all of which injuries plaintiff Flora Penders is informed and believes are permanent in character.

IV.

That by reason of all and singular the premises aforesaid plaintiff Flora Penders has suffered general damages in the amount of Twenty Thousand Dollars ($20,000.00).

Third Cause of Action

As and for a third, separate and distinct cause of action plaintiff Walter L. Penders complains of defendants and each of them and for cause of action alleges:

I.

That he is the husband of the above-named plaintiff Flora Penders.

II.

That he incorporates herein each and every, all and singular, generally and specifically, the allega-

tions contained in Paragraphs I, II, III, IV, V, VI, and VII of the First Cause of Action and Paragraph III of the Second Cause of Action, as though fully set forth herein.

III.

That said plaintiff Walter L. Penders has incurred indebtedness in the sum of Four Thousand Three Hundred and Eighty-three and 92/100 ($4,383.92) Dollars to date, for ambulances, medical care and attention, hospitalization, X-Rays, and physicians' and surgeons' services reasonable necessary and required to treat the said injuries of plaintiff Flora Penders sustained as aforesaid. That plaintiff Walter L. Penders will be compelled to incur in the future an additional indebtedness for necessary medical care and attention, hospitalization, X-Rays, the services of physicians and surgeons, medicines, and nursing services to be rendered and furnished to said plaintiff Flora Penders in the future to treat her said injuries in an amount unknown at the present time; that plaintiff Walter Penders will be damaged in said amount and prays leave upon ascertaining said amount, to amend this complaint to insert said amount.

IV.

That by reason of all and singular the premises aforesaid plaintiff Walter L. Penders has suf-

fered additional special damages in the amount of Four Thousand Three Hundred Eighty-three and 92/100 ($4,383.92) Dollars, together with insertion for additional special damages, as alleged above.

Wherefore, plaintiffs pray judgment against defendants and each of them as follows:

1. In favor of plaintiff Walter L. Pender in the sum of Twenty-six Thousand Two Hundred and Seventy-five and 51/100 Dollars for damages as alleged herein in the First Cause of Action.

2. In favor of plaintiff Flora Penders in the sum of Twenty Thousand ($20,000.00) Dollars for general damages as alleged herein in the Second Cause of Action.

3. In favor of plaintiff Walter L. Penders in the sum of Four Thousand Three Hundred and Eighty-three and 92/100 ($4,383.92) Dollars together with insertion for additional special damages, all as alleged herein in the Third Cause of Action.

4. For costs of suit herein and for such other and further relief as may be meet and proper in the premises.

/s/ ROBERT E. HALSING,

/s/ EUGENE H. O'DONNELL,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 9, 1947.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Now comes the defendant, United States of America, and answering the complaint, denies and alleges as follows:

Answering the first cause of action.

I.

Denies all the allegations of paragraph VI.

II.

Denies all the allegations of paragraph VII except it is admitted that on May 11, 1946, at about 6:40 p.m. of said day the plaintiff Walter L. Penders was driving an automobile then and there owned by said Penders in a generally easterly direction on Fremont Street at the intersection of Fremont Street and Park Avenue.

III.

Denies all the allegations of paragraphs VIII and IX.

Answering the second cause of action:

I.

Answering paragraph II, incorporates herein all the denials contained in the answer to the first cause of action.

II.

Denies all the allegations of paragraphs III and IV.

Answering the third cause of action:

I.

Answering the second paragraph, this defendant incorporates herein, as though fully set forth, all the denials set forth in its answer to the first cause of action.

II.

Denies all the allegations of paragraphs III and IV.

As and for a separate and further defense, defendant alleges that the plaintiffs were careless and negligent in and about the matters set forth in said complaint, and carelessly and negligently drove and operated their automobile, and that said carelessness and negligence of the plaintiffs was the proximate cause of the alleged damages, and proximately contributed thereto.

For a further and separate answer and by way of a cross-complaint, defendant and cross-complainant alleges:

I.

This is a civil action brought by the United States of America and over which this Court has original jurisdiction by virtue of the fact that the United States is plaintiff.

II.

That on the 11th day of May, 1946, at or near the intersection of Fremont Street with Park Avenue and Hugatito Road, in the County of Monterey, State of California, Walter L. Penders negligently drove his Hupmobile Sedan against the 1941 Chevrolet automobile, the property of the cross-complainant, which was then being driven as aforesaid.

As a result the cross-complainant's vehicle was damaged and the cross-complainant incurred expenses for the repair of the same in the sum of $326.91, which sum is the reasonable value of the cost of repairs thereof and is a sum less than the diminution in value of said automobile.

Wherefore defendant and cross-complainant prays that the complaint be dismissed and that it has judgment against Walter L. Penders in the sum of $326.91, together with costs.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant and Cross-Complainant United States of America.

/s/ WILLIAM E. LICKING,
Asst. U. S. Attorney.

[Endorsed]: Filed Dec. 19, 1947.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Now come the plaintiffs Walter L. Penders and Flora Penders and answering the Cross-Complaint on file herein, deny and allége as follows:

I.

Answering the allegations of Paragraph II of said Cross-Complaint plaintiffs deny all of the allegations thereof and plaintiffs deny that cross-complainant's vehicle was damaged in the sum of $326.91 or in any other sum or at all.

Wherefore plaintiffs pray that defendant and cross-complainant take nothing by its cross-complaint and that said cross-complaint be dismissed.

/s/ ROBERT E. HALSING,
/s/ EUGENE H. O'DONNELL,
Attorneys for Plaintiffs and Cross-Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 22, 1947.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files herein his amendment to the second cause of action

in plaintiffs' complaint on file herein contained, and in this regard said plaintiff alleges:

I.

That Flora Penders was during all the times herein mentioned the wife of plaintiff, Walter L. Penders.

II.

That plaintiff, Walter L. Penders, incorporates herein each and every, all and singular, the allegations contained in Paragraphs I, II, III, IV, V, VI and VII of his first cause of action, as though fully set forth herein.

III.

That as a result of the aforesaid collision, Flora Penders was cut, bruised, lacerated and shocked, both internally and externally, from which injuries said Flora Penders died on the 10th day of April, 1949.

IV.

That plaintiff, Walter L. Penders, is the sole, surviving heir at law of said Flora Penders.

V.

That by reason of the carelessness and negligence of defendants, and as the direct and proximate result thereof, plaintiff, Walter L. Penders, was compelled to, and did, incur an indebtedness in the sum of Eight Hundred and Seventy-five

Dollars ($875.00) for the funeral expenses for the burial of said Flora Penders, and that said sum is the reasonable value of said funeral expenses.

VI.

That by reason of said carelessness and negligence of said defendants, and as a direct and proximate result thereof, plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00).

/s/ [Indistinguishable.]
/s/ ROBERT HALSING,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Walter L. Penders, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the above entitled action; that he has read the within and foregoing amendment to complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those, that he believes the same to be true.

/s/ WALTER L. PENDERS.

Subscribed and sworn to before me this 14th day of April, 1949.

[Seal] /s/ ROBERT E. HALSING,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files an amendment to the first cause of action of plaintiffs' complaint on file herein by amending Paragraph VIII thereof to read in part as follows:

"Said plaintiff has incurred indebtedness for ambulance, nursing care, medical care and attention, hospitalization, x-rays and physicians" services reasonably necessary and required to treat his said injuries, in the amount of $6,200.00.

/s/ EUGENE H. O'DONNELL,

/s/ ROBERT E. HALSING,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files an amendment to the third cause of action of plaintiffs' complaint on file herein by substituting in lieu of Paragraph III thereof the following:

"That said plaintiff, Walter L. Penders, has incurred an indebtedness in the sum of $17,767.19 for ambulance service, medical care and attention, hospitalization, x-rays, and physicians' and surgeons' services, reasonable, necessary and required to treat the said injuries of said Flora Penders, his wife, sustained as aforesaid, which charges made for said services are the reasonable cost thereof."

/s/ EUGENE H. O'DONNELL,

/s/ ROBERT E. HALSING,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

This matter having been submitted to the Court, it is

Ordered that upon findings of fact to be submitted in accordance with the rules, judgment may be entered in favor of the plaintiff Walter L. Penders and against the defendant United States of America as follows:

Special damages for hospitalization and medical services for Flora Penders....	$17,767.19
Special damages for hospitalization and medical services for Walter L. Penders	5,181.49
Damages to automobile of Walter L. Penders	150.00
General damages to plaintiff Walter L. Penders for injuries to himself.....	15,000.00
General damages to plaintiff Walter L. Penders for loss of his wife, Flora Penders	15,000.00

Dated: June 3rd, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The above-entitled matter came on regularly for trial before the above-entitled court, sitting without a jury, the Honorable Herbert W. Erskine, Judge presiding, on the 14th, 15th and 19th days of April, 1949, plaintiff, Walter L. Penders, appearing in person and by and through his attorneys, Messrs. Eugene H. O'Donnell and Robert E. Halsing, and defendant, United States of America, appearing by and through Frank J. Hennessy, its attorney, represented by R. J. Scholz, Esq., and evidence, both oral and documentary, having been introduced on the issues raised by plaintiffs' complaint and defendant, United States of America's answer thereto, and said defendant's cross-complaint and said plaintiffs' answer thereto, and the cause having been submitted for decision, and the Court being fully advised in the premises, makes its Findings of Fact and Conclusions of Law as follows:

I.

That it is true that the above-entitled action was brought under the Federal Tort Claims Act of the Legislative Reorganization Act of 1946, Public Law 601, Seventy-ninth Congress, approved August 2,

1946, and is for a claim against the United States of America for money only, accruing on May 11, 1946, on account of personal injuries, damage to and loss of property, caused by the negligent act or omission of an employee of the United States of America while acting within the scope of his employment.

II.

That it is true that plaintiffs have at all times herein mentioned borne true allegiance to the Government of the United States of America and have in no way given encouragement to rebellion against the Government of the United States of America, or at any time aided or abetted in any manner or given comfort to any sovereign government at war with the United States of America.

III.

That it is true that at all times herein mentioned plaintiffs have been citizens of the United States of America and residents of the City of Pacific Grove, County of Monterey, State of California, residing at 208 Alder Street, Pacific Grove, California, and that plaintiff Walter L. Penders is now such citizen and resident.

IV.

That it is true that at all times herein mentioned Fremont Street and Park Avenue were, and now

are, public streets and highways in the City of Monterey, State of California.

V.

That it is true that at all times herein mentioned Carl B. Wanless, sued herein as First Doe, was an employee of the United States Government, to-wit: a member of the United States Army and acting in line of duty and within the scope of his employment under the Commanding General, Ninth Service Command, located at Fort Ord, California.

V.

That it is true that on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff, Walter L. Penders, with Flora Penders as a passenger therein, was driving his 1934 Hupmobile Sedan automobile, then and there owned by said plaintiff, Walter L. Penders, in an easterly direction on said Fremont Street, and at said time was turning northerly into said Park Avenue at the intersection of said Fremont Street and Park Avenue, at which time, and for sometime prior thereto, plaintiff, Walter L. Penders, had extended his arm indicating his intention of making the aforesaid turn; that at said time and place said Carl B. Wanless, acting as the agent, servant and employee of defendant, United States of America, and acting within the course and scope of his authority and employment as such agent, servant and

employee, and with the knowledge, permission and consent of said defendant, United States of America, was operating and controlling a United States Army 1941 Chevrolet panel truck in a westerly direction in the outer west bound lane of said Fremont Street; that it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed; that it is true that at said time said defendant, Carl B. Wanless, operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection of said Fremont Street and Park Avenue; that it is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approximately 150 to 175 feet to a person approaching said intersection from the westerly direction; that it is true that when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of completing his turn and was in the outer west bound lane of Fremont Street; that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm; that it is true that at said time there were no vehicles ahead, abreast or behind said defendant, Carl B. Wanless, in the inner or outer west bound lane; that it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there

negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street.

VII.

That it is true that by reason of the aforesaid carelessness and negligence of the defendant, Carl B. Wanless, and as a proximate result thereof, the said plaintiff, Walter L. Penders, was caused to be, and he was, cut, bruised, lacerated, chocked and injured and made sick, sore and lame, both internally and externally, and was more particularly injured as follows: that he received a comminuted fracture of the left wrist, lower end of radius, with mushrooming of fragments; oblique fracture, head of tibia; contusions; abrasions of the hands, trunk and lower extremities; shock; trauma. That it is true that said injuries to the left wrist and the head of the tibia of plaintiff, Walter L. Penders, are permanent in nature.

VIII.

That it is true that said plaintiff, Walter L. Penders, has incurred indebtedness for ambulance, nursing care, medical care and attention, hospitalization, X-rays and physicians' services reasonable, necessary and required to treat his said injuries in the amount of Five Thousand One Hundred Eighty-one and 49/100 Dollars ($5,181.49); that the

reasonable value of the special damages of plaintiff, Walter L. Penders, as aforesaid, is Five Thousand One Hundred Eighty-one and 49/100 Dollars ($5,-181.49).

IX.

That it is true that because of the carelessness and negligence of said defendant, Carl B. Wanless, as aforesaid, and as the proximate result thereof, plaintiff, Walter L. Penders' 1934 Hupmobile Sedan automobile was damaged; that pursuant to the stipulation of the parties to the above entitled action in open Court made, plaintiff, Walter L. Penders, by reason of the damage to said automobile, suffered further special damage in the sum of One Hundred and Fifty Dollars ($150.00).

X.

That it is true that by reason of the aforesaid carelessness and negligence of defendant, United States of America, plaintiff, Walter L. Penders, suffered general damages in the sum of Fifteen Thousand Dollars ($15,000.00).

XI.

That it is true that Flora Penders was the wife of Walter L. Penders; that it is true that Flora Penders died on April 10, 1949; that it is true that the death of Flora Penders was the direct and proximate result of the injuries sustained by her

through the carelessness and negligence of the defendants, as aforesaid.

XII.

That it is true that by reason of the carelessness and negligence of defendant, United States of America, as aforesaid, and as a proximate result thereof, Flora Penders was cut, bruised, lacerated, shocked and injured and was made sick, sore and lame, both internally and externally, and was more particularly injured as follows: comminuted fracture, femur, extending into knee joint; concussion of the brain, contusions and abrasions of the face, head, trunk and extremities; severe inter-cranial damage; severe damage to kidneys and internal organs; from which injuries Flora Penders died as aforesaid on April 10, 1949.

XIII.

That it is true that plaintiff, Walter L. Penders, was the husband of said Flora Penders.

XIV.

That it is true that prior to the death of Flora Penders as a result of the carelessness and negligence of defendants as aforesaid, and as a proximate cause thereof, plaintiff, Walter L. Penders, was obliged to and did expend the sum of Seventeen Thousand Seven Hundred and Seventy-six and 19/100 Dollars ($17,767.19) for ambulance, medical

care and attention, hospitalization, X-rays, and physician's and surgeon's services, reasonable, necessary and required to treat the said injuries of the said Flora Penders, his wife, sustained as aforesaid, and that the said charges made for the said services were the reasonable cost thereof.

XV.

That it is true that by reason of the aforesaid carelessness and negligence of defendant, United States of America, which caused the wrongful death of Flora Penders, plaintiff, Walter L. Penders suffered further general damages in the sum of Fifteen Thousand Dollars ($15,000.00).

XVI.

That it is not true that plaintiff, Walter L. Penders, was careless and negligent in driving and operating his 1934 Hupmobile Sedan automobile at the aforesaid time and place.

XVII.

That it is not true that the damage sustained by the defendant, United States of America's 1941 Chevrolet panel truck at the aforesaid time and place was due to the carelessness and negligence of plaintiff, Walter L. Penders.

XVIII.

That it is not true that plaintiff, Walter L. Penders, negligently drove his Hupmobile Sedan

automobile against the United States of America's 1941 Chevrolet panel truck.

XIX.

That the plaintiffs, Walter L. Penders and Flora Penders, employed Eugene H. O'Donnell and Robert E. Halsing as their attorneys to prosecute their claim in the above entitled action and they are entitled to reasonable attorney's fees in connection therewith.

Conclusions of Law

The Court makes the following Conclusions of Law from the foregoing Findings of Fact:

I.

That the above entitled Court has jurisdiction of this action.

II.

That defendant, United States of America, was negligent in the manner in which it operated and controlled its 1941 Chevrolet panel truck, which said negligence proximately caused the injuries and damages to plaintiff.

III.

That plaintiff, Walter L. Penders, is entitled to judgment against defendant, the United States of America, as follows:

Special damages for hospitalization and medical services for Flora Penders.	$17,767.19
Special damages for hospitalization and medical services for Walter L. Penders	5,181.49
Damage to automobile of Walter L. Penders	150.00
General damages to plaintiff, Walter L. Penders for injuries to himself	15,000.00
General damages to plaintiff, Walter L. Penders for loss of his wife, Flora Penders	15,000.00
	$53,098.68

together with his costs of suit; and that interest be paid on the total amount of said judgment at the rate of four (4%) percent per annum from the date of said judgment until paid.

IV.

That the sum of Ten Thousand Six Hundred and Nineteen and 73/100 Dollars ($10,619.73) is the reasonable sum to be paid to Eugene H. O'Donnell and Robert E. Halsing for attorneys' fees for services rendered plaintiff, Walter L. Penders, said sum being twenty percent (20%) of the judgment

awarded plaintiff herein. Said sum is not in addition to the said judgment, but is a part thereof.

Let the Judgment be Entered Accordingly.

Dated: This day of 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Receipt of copy acknowledged.

Lodged July 5, 1949.

[Endorsed]: Filed July 13, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27202-E

WALTER L. PENDERS and FLORA PENDERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST DOE and SECOND DOE,

Defendants.

JUDGMENT

This cause came on regularly for trial before the above entitled Court, sitting without a jury, on the 14th, 15th and 19th days of April, 1949, plaintiff Walter L. Penders appearing in person and by and

through his attorneys Eugene H. O'Donnell and Robert E. Halsing, and defendant United States of America appearing by and through its attorney Frank J. Hennessy, represented by R. J. Scholz, and evidence both oral and documentary having been introduced on the issues raised by plaintiff's Complaint and defendant United States of America's Answer thereto, and said defendant's cross-Complaint and said plaintiffs' Answer thereto, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That plaintiff Walter L. Penders have judgment against the defendant United States of America in the sum of $53,098.68, with interest thereon at the rate of 4% per annum from the date hereof until paid.

II.

That out of the said sum of $53,098.68 awarded to plaintiff Walter L. Penders, the sum of $10,619.73 shall be paid to his attorneys, Eugene H. O'Donnell, Esquire, and Robert E. Halsing, Esquire, as and for their attorney's fees.

III.

That said plaintiff have judgment against said

defendant for his costs herein in the amount of $55.80.

Dated: July 13th, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Entered in Civil Docket July 14th, 1949.

Lodged 6-14-49.

[Endorsed]: Filed July 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs in the above-entitled action and to their Attorneys, Eugene H. O'Donnell and Robert E. Halsing:

You and each of you please take notice that defendant in the above-entitled action hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment given and entered in the above-entitled action and from the whole thereof, which judgment was entered on the 14th day of July, 1949.

September 7th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant, United States of America.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the defendant and appellant, United States of America, may have to and including the 5th day of December, 1949, to docket cause and file the record on appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: October 10th, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Complaint and amendment to complaint.
2. Answer and cross-complaint.
3. Answer to cross-complaint.
4. Order for judgment.

6. Findings and conclusions of law.

7. Judgment.

8. Notice of appeal.

9. Copy of this praecipe.

10. Reporter's Transcript of the evidence and proceedings.

11. Deposition of W. L. Penders.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The Trial Court erred

1. In not finding plaintiff Walter L. Penders was guilty of contributory negligence.

2. That the following findings of fact are not supported by the evidence:

(a) Wanless operating his vehicle at excessive speed or without due care and caution.

(b) Wanless observed said vehicle when plaintiff was in the act of completing his turn; that when Wanless, on first observing plaintiff's auto-

mobile, negligently turned his vehicle to the right.

(c) That by reason of defendant's negligence plaintiff suffered damage.

(d) That the death of Flora Penders was the direct and proximate result of injuries sustained through the carelessness or negligence of defendant.

(e) That by the death of Flora Penders, plaintiff, Walter Penders suffered damages in the sum of $15,000.

(f) That it is not true that Walter Penders was careless or negligent.

(g) That the concluion of law that Walter L. Penders is entitled to general damages for the death of Flora Penders is not supported.

3. That the damage is excessive.

4. That Flora Penders died April 10, 1949, and that she could only appear by her personal representative.

5. In excluding evidence that plaintiffs were insured or were compensated in any way for damages alleged by them.

6. That there is insufficient evidence to justify the Court's decision.

Dated: December 12, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27202 H

WALTER L. PENDERS and FLORA PENDERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, FIRST DOE and SECOND DOE,

Defendants.

Before: The Honorable Herbert W. Erskine.
(No jury.)

Thursday, April 14, 1949, 10 a.m.

Appearances:

ROBERT E. HALSING, ESQ.,
EUGENE H. O'DONNELL, ESQ.,
For the Plaintiffs.

FRANK J. HENNESSY, ESQ.,
United States Attorney,

By RUDOLPH J. SCHOLZ, ESQ.,
Assistant United States Attorney,
For the Defendants.

PROCEEDINGS

The Clerk: Case of Penders versus the United States for trial.

Mr. O'Donnell: It is ready, if the Court please,

for the plaintiffs. May it please the Court, in this matter before we proceed, an examination of the file discloses there were two parties plaintiff, Walter L. Penders and Flora Penders, his wife.

The Court: I have read the complaint.

Mr. O'Donnell: You have read the complaint. Flora Penders passed away last Sunday, Your Honor, so by that reason, her name will have to be deleted as a party plaintiff. In view of the shortness of time, I am asking leave at this time to amend my second cause of action, which is the cause of action where I have asked damages on behalf of Mrs. Penders and substitute an amendment wherein I ask damages to the extent of $20,000 on behalf of Mr. Penders as a result of the death of Mrs. Penders.

The Court: You claim now that the death of Mrs. Penders resulted from the accident?

Mr. O'Donnell: I do, yes.

The Court: That will be granted.

Mr. O'Donnell: And I will file the amendment duly verified. Typical of Mr. Scholz, we stipulated a diagram and he tells me he left the diagram upstairs on his desk and I have just sent Mr. Halsing up for it and Mr. Halsing—do you desire an opening statement?

The Court: I would like to hear what the facts are.

Mr. O'Donnell: I see. ——and Mr. Halsing is going to make the opening statement and so if you will just bear with us for just a few minutes?

The Court: Sure.

Mr. O'Donnell: Thanks.

Mr. Scholz: I think he possibly [2*] failed to include that it was only through my efforts that we got a diagram (laughing) after he failed to get one.

Mr. O'Donnell: Of course, you are going to pay for it.

The Court: Well, we will recess then.

Mr. O'Donnell: I'm awfully sorry, Judge.

The Court: That's all right.

(Few minutes recess.)

Mr. Halsing: Your Honor. This is an action, Your Honor, for personal injuries filed under the provisions of the Federal Tort Act. The plaintiffs, Walter Penders and Flora Penders, were husband and wife, both of whom resided at Pacific Grove, in Monterey County, California. Mrs. Flora Penders died on last Sunday morning, April 10, 1949, leaving Walter Penders, the surviving husband, the sole plaintiff in this action. On May 11, 1946, at 6:40 p.m., Walter Penders was driving his automobile in an easterly direction on Fremont Avenue in the City of Monterey approaching the intersection of that street with Park Avenue. The diagram is so drawn that north, of course—well, usually north is on the top of the diagam, west is out in this direction and east is this way. So the Penders car was traveling in an easterly direction. At this time Walter Penders was accompanied by his wife and one Catherine Hunt, both of whom were in the

*** Page numbering appearing at top of page of original Reporter's Transcript.**

rear seat of the automobile. One David F. Edmund accompanied them [3] also and he sat in the front of the automobile with Mr. Penders.

At this same time one Carl B. Wanless, a soldier of the United States Army, was traveling, operating a Government-owned automobile, along Fremont Street in a westerly direction approaching this intersection with Park Avenue. Mr. Wanless was stationed at Fort Ord, California, and he was accompanied at the time by another soldier.

As indicated by the diagram, it will be noticed that Fremont Street is a four-lane highway with a double white center line dividing the eastbound and westbound lanes. The street approaching east towards Park Avenue ascends a grade of approximately ten per cent and then it takes a dog's leg very slight turn to the left, continuing on in an easterly direction and that turn is just at the crest of the grade. Park Avenue is just below the crest of the grade. East of Park Avenue, it will be noted that Fremont Street is a four-lane highway with a northerly westbound lane abutting right on, the edge of the pavement right on the sidewalk curbing. West of Park Lane, it will be noted that between the northbound lane and the sidewalk curbing, there is a gravel, unimproved gravel shoulder approximately fifteen feet wide. This is, for practical purposes, a third lane on the highway going in a westerly direction west of Park Avenue.

We will show that the plaintiff, Walter Penders, was [4] traveling about twenty miles an hour east-

erly on Fremont when he started to make a lefthand turn into Park Avenue and that before starting his lefthand turn, Walter Penders looked ahead up the hill where he had a view of at least 300 feet and that he saw no traffic approaching and that he then made his lefthand turn after giving a proper hand signal.

We will show that he crossed the center line and the inner westbound lane of Fremont and was about two-thirds across, of the way across the outer westbound lane when the United States Army panel truck came over the crest of the grade at a rapid pace and struck the automobile of the plaintiff on the left, I mean on the right front fender, the right front side of the car. We will show that the force of the impact swung the plaintiff's car in a northwesterly direction, shunting it up to the northerly curbline. At the time of the accident, Mr. Edmund who was riding in the front seat with Mr. Penders, was thrown from the car and he received head and chest injuries and died several days later. We will show that the plaintiff, Walter Penders, was thrown to the front of the driver's compartment and that he was rendered unconscious and we will show that his wife, Mrs. Penders, was thrown to the floor of the rear compartment of the car and that she also was rendered unconscious.

We will show that the Government vehicle laid down approximately 104 feet of skidmarks up to the point of impact [5] and that the plaintiff, Walter Penders' automobile, laid down no skidmarks what-

ever. We will show that the force of the impact was so severe that it threw the jump seats and the windshield from the Government panel truck clear over the automobile of the plaintiff on this action. We will show that the plaintiff, Walter Penders, as a result of this accident suffered severe injuries necessitating his hospitalization from May 11, 1946, up to March 25, 1947, and we will show that his wife, Flora Penders, as the result of the accident also suffered severe injuries necessitating her hospitalization from the day of the accident, May 11, 1946, up till last Sunday, April the 10th, 1949, the date of her death and we will also show that Flora Penders died as a result of the injuries she suffered on May 11, 1946, and we will also show to date the plaintiff, Walter Penders, has been put to an expense of over $20,000 for hospitalization and medical care and attention for himself and his wife.

The Court: You prayed, didn't you, in your complaint $6,000 for him, including the damage to the car, about $6,000?

Mr. Halsing: Yes, Your Honor.

The Court: About $4,000 for her?

Mr. Halsing: Yes, but——

The Court: That makes approximately ten.

Mr. Halsing: But that complaint was filed approximately two years ago. [6]

The Court: I see.

Mr. Halsing: In May of 1947.

The Court: Yes.

Mr. O'Donnell: And we are going to ask to

amend the complaint to strike out the proof, may it please the Court, later on in the trial. Now, for the purpose of the record I would like a few stipulations as to the width of this highway. I note according to the diagram that it's one inch for each twenty feet, and so it will be stipulated, Mr. Scholz, that the diagram shows the width of the highway, of Fremont Extension or Fremont Street at 2⅛ inches, that will be forty—can you help us out there, Your Honor—2⅛ inches, that will be forty, a little over forty feet.

Mr. Scholz: That will be 2½ inches, about 42½ feet.

Mr. O'Donnell: Forty-two and a half feet wide.

The Court: Is that the width over all of the highway?

Mr. O'Donnell: The width of the highway.

The Court: Yes, between curb and curb?

Mr. O'Donnell: No, no. From edge of the pavement to edge of the pavement.

Mr. Scholz: The colored is paved, Your Honor. The color here, that's the pavement, as I understand it.

The Court: Forty feet?

Mr. O'Donnell: Forty-two and a half [7] feet.

Mr. Scholz: Yes.

Mr. O'Donnell: Yes, 42½ feet. And that the shoulder or gravel pavement on the west side of, on the north side of Fremont Street west of Park Avenue is three-quarters, sixteen feet. Sixteen feet in width. Is that o.k.?

Mr. Scholz: That's all right.

Mr. O'Donnell: And——

Mr. Scholz: May I suggest this? Counsel approving, I will just put a mark here indicating the width. Is that agreeable, Your Honor?

Mr. O'Donnell: It's agreeable.

Mr. Scholz: 42½, and this you make it how much?

Mr. O'Donnell: Sixteen.

Mr. Scholz: So we won't forget it. I won't remember.

Mr. O'Donnell: I think that's everything. Now, may it please the Court, I would like to ask leave of court at this time to call Dr. Dormody, the attending physician. He has come up here from Monterey. He is a very busy man, and do you have any objection?

Mr. Scholz: No, Your Honor.

The Court: Mr. Scholz, do you want to make an opening statement now, or after the doctor——

Mr. Scholz: Whatever you please, Your Honor. It's immaterial to me.

The Court: Well, let's take the doctor first and then [8] either Mr. Scholz can make his opening statement now or he can make it at the beginning of his case, although I would like to know what you claim before we go ahead.

Mr. Scholz: I will make it as soon as the doctor——

Mr. O'Donnell: Doctor, will you take the stand, please?

DR. HUGH F. DORMODY

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. O'Donnell:

The Court: Dr. Hugh F. Dormody?

The Witness: I think you know my brother.

Mr. Scholz: In view of the fact that the Court knows the brother, I will stipulate that he is qualified.

Mr. O'Donnell: Well, I would prefer it for the record. Sit down, please.

Q. Your name is Hugh F. Dormody?

A. Yes.

Q. And what is your business or profession?

A. I am a physician and surgeon.

Q. And you have been practicing your profession as a physician and surgeon in Monterey for some years past, is that correct? A. Yes, sir.

Q. And how long, Doctor?

A. I have been practicing in Monterey since January 1, 1923. [9]

The Court: Twenty-six years.

Q. And of what school are you a graduate?

A. University of California.

Q. And how long have you been practicing your profession as a physician?

A. Twenty-eight years.

Q. During all that time you have been a duly

(Testimony of Dr. Hugh F. Dormody.)

licensed practicing physician in the State of California, is that correct? A. Yes, sir.

Q. Are you connected with any hospitals, Doctor? A. Monterey Hospital.

Q. And that is located in Monterey, California?

A. Yes, sir.

Q. And you have been connected with that hospital for how long? A. Since April 7, 1930.

Q. Now, do you know Walter Penders?

A. I do.

Q. And when did you first become acquainted with Walter Penders?

A. The 11th of May, 1946.

Q. On that occasion, did you attend him as an attending physician? A. I did.

Q. And where did you first see him on that day?

A. In the emergency room of Monterey Hospital.

Q. At approximately what time? Do you have that? A. Seven o'clock P.M.

Q. Seven o'clock. And will you tell us what observations you made of Mr. Penders at that time?

A. At the time I first saw him, he was in shock. His preliminary physical findings [10] were fracture of the left wrist and a fracture of the left tibia into the left knee joint. He had multiple contusions, abrasions and lacerations of his hands, face, trunk and lower extremities.

Q. And what, if any, treatment did you administer at that time, Doctor?

A. Well, he was treated immediately for shock.

(Testimony of Dr. Hugh F. Dormody.)

At the same time his fractures were temporarily immobilized to keep them from further inducing shock by painful movements. And he was hospitalized.

Q. He was hospitalized immediately, was he?

A. Immediately.

Q. Now, can you tell us when the next time was that you saw Mr. Penders?

A. I saw him several times during the night because of his condition and the condition of the other occupants of the car and was in constant attendance until March 24, 1947.

Q. Now, confining yourself to the last time, Doctor: His left wrist, was it? A. Yes.

Q. You say he suffered a fracture of the left wrist?

A. Yes, a comminuted fracture of the left wrist.

Q. And what, if any, treatment did you furnish?

A. The fracture was immobilized, reduced and, as well as the fracture of his left knee.

Q. Well, did you cause X-rays to be taken, Doctor?

The Court: Those are——

A. We did.

The Witness: I think they have gotten mixed up here, [11] Judge.

Q. (Continuing): X-rays were taken of his wrist and knee.

The Court: Were either of those open reductions?

(Testimony of Dr. Hugh F. Dormody.)

The Witness: No, there were no open reductions performed. These are X-rays that were taken at the time. Because of the severe shock that he was in, it was rather difficult to do much for him. Here's the wrist. Here's the fractures of his left——

Q. Let us take one think at a time, Doctor, if you will.

The Court: Will you do that so we can examine one at a time?

The Witness: The fracture of his left forearm showing a comminuted fracture of his left radius.

Q. Will you point out to the Court just where the——

A. The fracture is here. These pictures were taken with a portable X-ray in a bed. He was not moved to the X-ray room at the time. You see the fracture here with considerable dislocation.

The Court: Which arm was that?

The Witness: Left.

Mr. O'Donnell: Left.

The Court: Left.

Q. Is that what you call a linear fracture or was it comminuted?

A. Well, that was a comminuted fracture.

Q. Comminuted fracture. Will you give us your definition of a comminuted fracture?

A. A comminuted fracture is where [12] the fragments of the bones have multiple fractures although they might be very small. It isn't a

(Testimony of Dr. Hugh F. Dormody.)

simple. A simple fracture is just where the bone is broken off.

Q. In other words, the fracture is splintered with many——

A. Well, this is comminuted and compacted to a degree.

Q. Compacted?

A. Driven into itself, you see. And that's what split the distal fragment was having the shaft of the bone driven into the other.

Q. Do you have any other X-rays?

The Court: Offer that?

Mr. O'Donnell: I was going to offer both as one, Your Honor.

The Witness: Here's the same.

Mr. O'Donnell: Just one moment. At this time we will offer this X-ray as Plaintiff's Exhibit 1. Do you want to see it, Mr. Scholz?

Mr. Scholz: No.

The Court: Admitted. Plaintiff's Exhibit 1?

The Clerk: Yes, Your Honor.

Q. Have you any other X-ray, Doctor, of the same arm?

A. Yes, I have three of them, or two of them. One was the anterior-posterior view, on the other. This is the lateral view taken at the same time.

The Court: What was the other view?

The Witness: That was the anterior-posterior view. [13] This is the lateral view taken at the same time.

(Testimony of Dr. Hugh F. Dormody.)

Mr. O'Donnell: For the purpose of the record, I'll ask that this X-ray, which is the lateral view—

The Witness: Yes.

Mr. O'Donnell: —of Mr. Penders' left arm be introduced in evidence and marked Plaintiff's Exhibit 2.

The Clerk: Plaintiff's Exhibit 2.

Q. Have you another X-ray, Doctor?

A. X-rays here after manipulation and reduction show both the anterior-posterior views and the lateral views.

The Court: When was that taken?

The Witness: That was, the date on here is, this was taken on the 14th of May, 1946.

Mr. O'Donnell: I will ask that that be introduced in evidence and marked Plaintiff's Exhibit next in order. It will be Plaintiff's Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 in evidence.

Q. Now, Doctor, was Mr. Penders' arm put into a cast? A. It was put into splints.

Q. It was put into splints?

A. Metal splints, aluminum splints.

Q. Calling your attention to this object that appears, I presume, over the area——

A. That is—

Q. ——of the palm of the hand: will you tell us what that is? A. That's part of the splint.

Q. That's part of the splint?

A. That splint is designed to put his arm, his hand in extreme ulnar flexion for reducing the fracture of his radius.

(Testimony of Dr. Hugh F. Dormody.)

Q. I see.

A. In other words, his hand is turned out that way and this is a grip.

Q. Now, Doctor, how long—just sit down, Doctor.

(Clerk and witness placing viewer.)

Q. (Continuing): Just sit down, Doctor, if you will. Now, you say you applied splints to this wrist, is that correct? A. That's correct.

The Court: What was that last X-ray plate?

Mr. O'Donnell: Number 3, Your Honor.

The Court: What?

Mr. O'Donnell: Three.

The Court: Three, is it?

Mr. O'Donnell: Yes.

Q. And how long was Mr. Penders' left arm in that form of a splint, approximately?

A. Mr. Penders has had to wear a supporting splint to his arm up until very recently. I am not aware until recently, I mean, until today, that he has abandoned it.

Q. I see. Well, this form of splint that appears in the X-rays, particularly in Plaintiff's Exhibit 3, how long did that form of splint, was that kept on his hand or his arm?

A. Approximately three months, that particular type. [15]

Q. And then other forms of splints were applied after the removal—— A. Yes.

(Testimony of Dr. Hugh F. Dormody.)

Q. ——of that particular form of splint shown in the X-ray, is that correct?

A. That's correct.

Q. Now, Doctor, did you obtain a perfect union of the broken area, the arm?

A. No, the result obtained here is a very poor one, leaving the man with a permanent radial flexion deformity.

Q. And what is a radial flexion deformity?

A. If you could put the plates up so I could explain it to the people. Perhaps you know all these things but it seems rather difficult to be talking——

Q. Yes.

A. This comminution here—if you want Mr. Penders to come up, I can demonstrate it—this break here, this portion which is broken off that you see here, the multiplicity of very fine fractures in it, practically completely absorbed, leaving him a shortening of this bone here with his wrist twisted clear over. You want me to show Mr. Penders' arm to the Judge?

Q. Yes. Mr. Penders, will you step up here a minute?

(Mr. Penders comes up.)

A. This piece here belongs in here and in this picture you can, his arm in reduction was in this position gripping this grip. However, because of this comminution here, the end of the bone, and his

(Testimony of Dr. Hugh F. Dormody.)

recuperative powers at his age being what they are, this piece of the bone absorbed leaving him approximately a half inch shortening between the [16] large radius and compared to the small bone of the forearm, the ulna, so he now has this radial flexion deformity, with his ulna protruding here to the side. It left him with that deformity and that's why the result isn't, is as it is, is because the bone actually absorbed. It wouldn't grow.

Q. Doctor, that condition of the wrist, as you have just shown the Court, that's a permanent condition, is it? A. That is permanent.

Q. Now, you stated that Mr. Penders also sustained a fracture of the left leg, was it?

A. Yes, knee.

Q. Were X-rays taken? A. They were.

Q. And what portion of the leg was shown to be fractured?

A. The left tibia into the knee-joint.

Q. I see, and, Doctor, what kind of a fracture was that? Was that comminuted?

A. That was a diagonal fracture.

Q. A diagonal fracture. And you caused X-rays to be taken? A. I did.

Q. ——of Mr. Penders' legs? A. Yes.

Q. Leg, rather? A. I did.

Q. Have you those X-rays with you?

A. I have.

Q. I will ask you to step down here before——

A. Let me get these dates. (To reporter.) You don't mind me using your desk?

(Testimony of Dr. Hugh F. Dormody.)

Q. Now, just for the purpose of the record, you have shown us an X-ray here. What does that disclose? [17]

A. It is an X-ray of the left knee-joint showing the left femur coming down from the hip, the joint itself, the tibia and the fibula. And here you see a fracture running across the lateral surface of the tibia. You can see it going across there. It goes in at this point. It isn't very well demonstrated.

Q. Well, for the purpose of the record——

The Court: It is in the tibia, isn't it?

Mr. O'Donnell: Yes.

The Witness: That is in the tibia but continues involving the joint.

Mr. O'Donnell: Just a moment. I will introduce into evidence——

The Witness: That is the anterior-posterior view.

Mr. O'Donnell: ——Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's four in evidence.

Q. Have you any other X-ray?

A. This is a lateral view of the same thing showing just the, the lateral separation there below the knee.

Mr. O'Donnell: I will ask that this be introduced in evidence and marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 5.

The Court: Let me see that.

The Clerk: Yes, sir.

(Testimony of Dr. Hugh F. Dormody.)

The Court: Where is the fracture there?

Q. Will you point out the fracture to the Judge?

A. This [18] just shows the lateral view looking at it sideways. This is actually in profile. You can see it here, you see? But the anterior-posterior view shows the fracture running into the joint.

Q. Have you any other X-rays, Doctor, taken of the knee-joint?

A. No, they haven't, they haven't enclosed them here.

Q. Well, Doctor——

The Court: May I interrupt just a minute? That is Plaintiff's Exhibit 4 and 5, isn't it?

The Clerk: Yes, Your Honor.

Q. If you will sit down, Doctor. What treatment, Doctor, did you administer to the leg of Mr. Penders?

A. Well, the, the entire left extremity from just below the hip, including his knee and ankle and foot, were immobilized in a splint.

Q. And how long did you keep the leg in a splint, if you remember?

A. Approximately four months.

Q. Four months. And did you get a good union there?

A. Got a, a fair union with some hypertrophic changes in the joint which have given him a painful knee-joint.

Q. And will he continue to suffer pain in that joint from time to time in the future?

(Testimony of Dr. Hugh F. Dormody.)

A. Yes, he will always have a painful joint.

Q. Now, how long—before we get to that—Mr. Penders has a deficient right hand, is that correct?

A. He has a congenital anomaly of his right forearm and hand.

Q. I see. And how long was Mr. Penders confined to the hospital, [19] Doctor?

A. Until the 24th of March, 1947.

Q. And, Doctor, have you rendered a bill for your services rendered Mr. Penders?

A. Yes, we have bills for——

Q. And I show you here a statement of the Monterey Clinic and ask you whether or not you can identify that? A. Yes, I do.

Q. And what is that?

A. That's a bill for services rendered Mr. Penders during, from May 11, 1946, until March 24, 1947. It's a hundred, let's see, five, thirteen, seventeen hundred and thirty-five dollars total.

Q. I see.

Mr. Scholz: March 15?

Mr. O'Donnell: From May 11, 1946, to March 24, 1947.

Q. Doctor, in your opinion is this a reasonable charge for your services rendered? A. Yes.

Mr. O'Donnell: I will ask this be introduced in evidence——

The Court: What was the amount of that?

Mr. Scholz: Seventeen, thirty-five.

The Witness: Seventeen hundred, thirty-five.

(Testimony of Dr. Hugh F. Dormody.)

The Clerk: Plaintiff's Exhibit 6 in evidence.

Q. Now, I show you here a group of bills and ask you to examine them and tell us, if you will, Doctor, if the amounts mentioned therein for hospital services rendered Mr. Penders are reasonable.

Mr. Scholz: Well, I don't—I hate to object because [20] I don't want to be technical but I don't know if he knows that service was rendered. How can he testify to something unless he knows that service was rendered? I suggest this: that the witness let me see the bill and you and I go into conference and maybe we can stipulate. I mean I don't like to have testimony go in that is not competent.

The Court: Well, if the Doctor knows that the services were rendered, why, you can lay the foundation that way, can't you?

Mr. Scholz: That's right.

Q. Well, Doctor, you are connected with the Monterey Hospital, are you not? A. Yes, sir.

Q. And you are familiar with the charges at that hospital? A. Yes, sir.

Q. ——for hospitalization services rendered, of all types? A. Yes, sir.

Q. I see. And have you looked at those bills?

A. Yes, sir.

Q. ——that I have handed to you, and in your opinion would you say that those are reasonable charges? A. Those are reasonable charges.

The Court: And do you know of your own knowledge that those services were rendered?

(Testimony of Dr. Hugh F. Dormody.)

The Witness: Yes, sir.

Mr. O'Donnell: At this time I'll—subject to correction, we will run this up on the adding machine, and the [21] total of these bills is $3,446.49.

The Court: Well, that is for Mrs.——

Mr. O'Donnell: No, this is for Mr. Penders.

The Witness: Hospital.

Mr. O'Donnell: Yes, hospital bill. I am confining myself to Mr. Penders.

Mr. Scholz: 3446.

Mr. O'Donnell: 49. And I will ask that these bills be introduced as one exhibit, if the Court please.

Mr. Scholz: Object on the grounds of no proper foundation being laid.

The Court: Objection is overruled. What's the amount of that?

Mr. O'Donnell: $3,446.49.

The Clerk: Plaintiff's Exhibit 7 in evidence.

The Court: Is that seven?

The Clerk: Yes, Your Honor.

Q. Now, Doctor, you have testified that—if I understood you correctly—that Mr. Penders suffered a head injury also?

A. He had a concussion at the time that he came in.

Q. And will he suffer any permanent effects from that in your opinion? A. No, sir.

Q. He will not. And he will not suffer any permanent effects from the contusions and abrasions

(Testimony of Dr. Hugh F. Dormody.)

that you found in and about his body at the time that he was first brought into the hospital? [22]

A. No, only those to his wrist and knee are permanent.

Q. I see. Doctor, on the same day—that is, May 11, 1946—did you see Mrs. Flora Penders?

A. I did.

Q. And where did you first see her?

A. Saw her in one of the emergency rooms in Monterey Hospital.

Q. And did you make an examination of Mrs. Penders at that time? A. I did.

Q. And would you tell us what you ascertained from your examination of Mrs. Penders at that time?

A. At that time Mrs. Penders, that, I saw her on the evening of May 11, 1946, she was unconscious.

The Court: Did you see her at seven p.m. at the same time you saw the——

The Witness: Well, that's the time they come in, about the same time.

Q. Did you administer any aid to her at that time, Doctor? Oh, pardon me; I see you are familiarizing yourself with the——

A. She was unconscious and in a deep state of unconsciousness due to shock. She had certain indications that she might have intercranial damage to the extent of a skull fracture. She had a rigid abdomen, very difficult breathing and a badly comminuted fracture of the left femur.

(Testimony of Dr. Hugh F. Dormody.)

Q. And confining yourself, Doctor, to the fracture of the left femur: what, if anything, did you do towards the treatment of that injury?

A. We immobilized the femur. [23]

Q. And did you cause X-rays to be taken prior to the immobilizing of the femur? A. We did.

Q. Have you those X-rays with you?

A. I have.

Q. I will ask you if you would step down here to the light again and show us those X-rays?

A. Get these in order. A temporary splint was applied to this, Mrs. Penders' leg to immobilize her femur, immobilize her entire left lower extremity. Because of her unconscious state, X-rays were not taken, until the 13th of May.

Q. That was two days after you saw her?

A. Yes, sir.

Q. Was she unconscious all that time, Doctor?

A. She was in shock all the time. She gradually regained consciousness the first twelve hours hospitalization. This is a picture taken at that time. Anterior-posterior view.

Q. You are now giving us an anterior-posterior view of the—what portion of the leg of—left leg of Mrs. Penders?

A. The—that is a picture in, showing the left knee-joint and the lower third of the left femur as well as the joint and the left tibia and fibula, showing a diagonal fracture here, fracturing off the external condyle of the left femur into the knee-joint.

(Testimony of Dr. Hugh F. Dormody.)

Q. And did you take any——

Mr. O'Donnell: Just pardon me a minute. I will introduce in evidence and have marked Plaintiff's Exhibit next in order.

The Court: Eight. [24]

The Clerk: Plaintiff's Exhibit 8.

Q. Now, do you have any other X-ray, Doctor?

A. I have a lateral view of the left lower extremity.

Q. And will you point out on that where the fracture is shown to exist?

A. This shows the shaft of the femur coming down. It is very badly comminuted at this point. It is dislocated anteriorly over the distal end of the femur giving this different direction here. The shaft is practically resting on the top of the femur end of the left knee-joint.

Mr. O'Donnell: I will ask this be introduced in evidence and marked Plaintiff's Exhibit 9, I believe?

The Clerk: Yes, sir. Plaintiff's Exhibit 9 in evidence.

Q. In addition to this X-ray, Doctor, have you any other X-rays?

A. I have a series of X-rays taken here showing a, the method of reduction and application of skeletal traction. You want them all introduced as—unfortunately, they are not in order but it shows approximately what happened.

(Testimony of Dr. Hugh F. Dormody.)

Q. Well, I don't think we need any other X-rays, Doctor. A. This shows——

Q. You have another X-ray? Just for the purpose of the record, we want to keep the record straight, see.

A. This is the anterior-posterior view showing the fractures here of this, the shaft of the femur being driven between, into the distal fragment, splitting it in two, so as the shaft was driven [25] down, it separates in these two directions. This shows a Kirschner wire through the tibia, which was used for skeletal traction to pull this fragment away from this. There was counter-pulling at the hip which doesn't show on this picture.

The Court: That's what you call traction, isn't it?

Q. Well, you put her in traction, didn't you, Doctor? A. Yes.

Q. I see, Doctor.

The Court: That is Exhibit 10?

Mr. O'Donnell: That is Exhibit 10, yes, sir.

The Court: What's the date of that?

The Witness: That was on the 17th.

Mr. O'Donnell: Of May, 1946.

The Witness: Well, we can find the 17th here and I'll show you. Here is a later one.

Q. You have another X-ray, Doctor?

A. Lateral view taken on the same date.

Q. That is, the 17th of May, 1946?

A. Yes. Skeletal traction is in the tibia with

(Testimony of Dr. Hugh F. Dormody.)

counter-traction at the hip-joint showing the fragments here pulled into pretty good position as the traction is applied, the shaft held in position, the distal fragment, and any articulation is being rotated anteriorly in fair position, showing at this same time the more extensive fractures that didn't appear in the first picture.

Q. Now, how long—you can take the——

Mr. O'Donnell: Well, let me put [26] this in evidence. That would be 11, would it?

The Clerk: Plaintiff's Exhibit 11.

Q. All right, Doctor. You can pick these up afterwards, if you don't mind? A. All right.

Q. Now, how long, Doctor, did Mrs. Penders continue in traction?

A. I have some of my papers over here.

The Court: I didn't hear that question.

Mr. O'Donnell: I say, how long did she continue in traction?

A. She was held in traction approximately six months.

Q. Six months? A. Yes.

Q. And how long did she remain in the hospital, Doctor?

A. She remained in the hospital at that time until the 24th of March, 1947.

Q. And at that time did she go home?

A. At that time she was taken home in an ambulance under the care of practical nurses too, because of the, Mr. Penders being unable to cope with these hospital expenses and medical expenses. She wasn't

(Testimony of Dr. Hugh F. Dormody.)

in any stretch of the imagination well enough to go home.

Q. Was she subsequently returned to the hospital?

A. She was brought back to the hospital April 17th.

Q. Of 1947? A. Yes.

Q. I see. And did you have occasion to examine her at that time? A. I did.

Q. And what condition did you find to exist?

A. She was, [27] she had a lobar pneumonia. She was unconscious and in a state of coma.

Q. And she remained in the hospital from April, 1947, up until the time of her death, is that correct?

A. Yes. Yes, sir.

Q. And during that period of time I just mentioned, what was her condition? What were her ailments? A. Well, I would like to explain.

Q. You may, Doctor.

Mr. Scholz: I think you ought to answer the question first, Doctor.

The Witness: What is it?

Mr. Scholz: I think, if Your Honor please, I think he should answer the question first.

The Court: What was the question? Will you just read the question? (Question read.) Can you answer the question?

The Witness: I can.

A. At the time of the injury, she had severe internal injuries both to her chest and to her kidneys. Her urine was full of blood and from that

(Testimony of Dr. Hugh F. Dormody.)

condition in her kidneys, she had not recovered at the time she left the hospital. She had very poor kidney function. Her bleeding lasted during the first six weeks of her hospitalization from her original injury and left her with a great deal of kidney damage, so much so that she had at times a high accumulation of nitrogenous waste products in her blood stream and she had to be guarded very carefully dietetically [28] to keep her from going over into a state of uremia. That was the condition that was a direct result of her injuries and the condition that she was in more or less during her entire period of time of hospitalization from the time of her original injuries up until the time of her death.

Q. I see. And can you attribute this kidney condition which existed from the day of the accident to the accident itself?

A. The only kidney condition that she had at the time I saw her was, as a direct result of the accident because it was an acute hemorrhagic thing.

Q. And that condition continued to exist—perhaps alleviated a wee bit—up until the time of her death?

A. During the remainder of her lifetime.

Q. I see. And also you say you found injury to her lungs? Did I understand you correctly?

A. She had a bad compression of her chest at the time she came in. She had an acute passive congestion of both lung fields. Because of the seriousness of this woman's injuries, it was never

(Testimony of Dr. Hugh F. Dormody.)

possible at any time to move her into the X-ray department for thorough X-raying. These are portable pictures taken in her room in her bed so skull pictures were never taken and satisfactory pictures of her lungs were never secured.

Q. And when she returned in April of 1947, she remained there up until the time of her death last Sunday, is that correct?

A. That's right. [29]

Q. And during that entire period of time she was under your care?

A. Under my care and she has never, since the time she was hurt.

Q. She has been under your care since the time she was hurt. And, Doctor, can you attribute the death of Mrs. Penders to the injuries she sustained in this automobile accident on May 11, 1946?

A. The direct cause of death was due to the injuries.

The Court: Was this lobar pneumonia and unconsciousness of hers, for which she was brought back to the hospital, caused by this injury, too?

The Witness: Well, she was in this deep state of depletion and, so that she shouldn't have gone home. The transporting her undoubtedly was a contributing factor. That would probably not have occurred had she remained in the hospital. But she was taken out of the hospital against my advice and I was, of course, sorry to have it all happen because she was in no condition to be removed from

(Testimony of Dr. Hugh F. Dormody.)

the hospital and placed under the care of a practical nurse in the home. It was one of those things where it just happened because of the economic situation.

Q. Now, have you rendered a statement, Doctor, for the services performed on Mrs. Penders' behalf? A. I have.

Q. And I show you here a ledger sheet of the Monterey Clinic and ask you whether or not you can identify that ledger sheet?

A. These, these are the charges that I submitted to the hospital. I have verified all of the original charge slips yesterday and [30] this——

Q. And what was the total amount of your charge for your services?

A. The total amount of my charge for my services is $4,465.

The Court: That is for your services on Mrs. Penders?

The Witness: Yes, sir; that's the Monterey Clinic.

Q. And you are the Monterey Clinic?

A. Well, I have seen her and other people have seen her but that is the total charge. I made all the charges.

Q. You made all the charges, and, Doctor, is that a reasonable charge for the services that were rendered? A. Yes, sir.

Mr. O'Donnell: I will ask that this ledger sheet be introduced in evidence and marked Plaintiff's Exhibit 12.

(Testimony of Dr. Hugh F. Dormody.)

The Clerk: Twelve.

The Court: Is that the service from May 11 up until the death?

Mr. O'Donnell: Until the death, yes, Your Honor.

Q. I show you here a package of bills and ask you—the bills being statements from the Monterey Hospital—and ask you to examine them and tell us whether or not in your opinion as a member of the staff of the Monterey Hospital that is a reasonable charge for the hospital services rendered Mrs. Penders for the period covered therein, that is, namely, from May 11, 1946, to April 10, 1949?

A. Yes, sir.

Mr. O'Donnell: I will ask that these bills be introduced as Plaintiff's Exhibit 13. [31]

The Clerk: Thirteen.

Mr. O'Donnell: And subject to correction, the total amount of the bills as we have added them up on the adding machine is $12,942.19.

Mr. Scholz: Objection on the ground that the proper foundation has not been laid.

The Court: Well, the witness here is, has already identified the bills as being reasonable. Let me ask you this: Do you know of your own knowledge that the services stated in those bills were performed by the hospital?

The Witness: I do, and I can also explain why I know they are reasonable. Because of the economic situation, I negotiated with the business

(Testimony of Dr. Hugh F. Dormody.)

manager of the hospital to render private-room services to Mr. Penders' wife at ward-room rates, and I was responsible for that and kept in touch with him at times so I know they are reasonable. And those are the bills that he paid.

The Court: Objection is overruled and it will be admitted, Exhibit 13.

Mr. O'Donnell: You may take the witness stand.

The Court: What's the amount of those bills?

Mr. Scholz: Doctor——

Mr. O'Donnell: Just one——

The Clerk: $12,942.19.

The Court: 42, 19? [32]

The Clerk: Yes, sir.

Mr. O'Donnell: Does Your Honor want to take a recess at this time or do you want to go on?

The Court: Yes. I think it would be well for the reporter.

Mr. O'Donnell: Yes.

The Court: Ten minutes.

(Recess, 11:00 to 11:12 A.M.)

Cross-Examination

By Mr. Scholz:

Q. Doctor, were you at the Monterey Hospital when Mr. and Mrs. Penders were brought there?

A. I was.

Q. Did you make out the report out at the hospital of their injuries? A. Yes, sir.

Q. Didn't it show that Mr. Penders had a frac-

(Testimony of Dr. Hugh F. Dormody.)

tured left wrist, sprained left knee, and cut over the right side of the head?

A. The report shows that he had, he was in shock. He had a fractured left wrist, fractured left tibia, and the knee-joint.

Q. That is the left knee, isn't it?

A. Yes. Multiple contusions, abrasions and lacerations of the face, hands, trunk, lower extremities.

Q. In other words, he had contusions: that means bruises and so forth? A. That's right.

Q. And that was all the injuries shown to him at that time as a result of this accident? Now——

Mr. O'Donnell: Better answer "yes" or "no," Doctor, [33] so the reporter——

Mr. Scholz: I thought he——

The Witness: That's my report, yes.

Q. Now, Doctor, Mrs. Penders showed a sprained left knee? A. No.

Q. What did the—you made out a report for the Monterey Hospital, too, on Mrs. Penders?

A. I have it right here.

Q. What does that show?

A. Unconscious due to concussion, possible fractured skull, internal injuries, comminuted fracture of the left femur.

Q. And it developed that she did have a—well, the left femur, that runs into the knee, doesn't it?

A. That's right.

Q. In ordinary parlance, we would call it an

(Testimony of Dr. Hugh F. Dormody.)

injury to the knee, not ordinary parlance but——

A. No, it is not. It is a fracture of the femur into the knee-joint.

Q. She had no fractured skull or anything of that kind?

A. In my opinion she had a fractured skull, that is, I thought possible fractured skull.

Q. But the preliminary report was that she had no skull fracture?

A. X-rays were never taken to confirm the fact. She was unconscious the first twelve hours while in the hospital.

Q. And no X-rays were taken of that from the time she went in until the time she died?

A. She was never sufficiently recovered from her original injuries to be subjected to complete skull plates. [34]

Q. Well, Doctor, do you mean—you mean to say that her injuries were such that an X-ray could not be taken of her head?

A. Complete skull couldn't be taken. I can explain that, if you wish.

Q. You might.

A. She had a very severe comminuted fracture of her femur, as shown. She was in the extension. In order to get complete skull plates, you have to turn people, in order to take the anterior-posterior; you have to turn them on the side, to take the lateral; you have to turn them on their face, to take them through the back of their head. A com-

(Testimony of Dr. Hugh F. Dormody.)

plete skull necessitates about twenty pictures in different positions in order to identify any fractures that might exist and with a woman in extension and with, you know she was in a semi-comatose condition, it was impossible to move her around to that extent without doing great damage to her. It was not taken because it was felt that her other injuries were of more major importance and they should be treated first.

Q. In other words, you did not rule out the possibility of a skull fracture but you felt that it was not sufficiently important to take away any care that might be given to the other, femur?

A. That's right.

Q. And Doctor, she was 69 years old, Mrs. Penders, at the time of the accident?

A. The age given her on my report is 79.

Q. 79 I mean. Did I say 69? [35]

Mr. O'Donnell: Yes.

Mr. Scholz: I'm sorry. Oh, I got 69.

Mr. O'Donnell: No, it's 79.

The Witness: It might have been 69 or 79. This, of course, is hearsay. We got this from the only person who was conscious out of the four people in the car and she thought Mrs. Penders was 79 when I spoke to her and asked her age.

Q. Well, anyway, she was a very elderly woman?

A. I never confirmed her age either.

Q. You are a tactful man, Doctor. And Mr. Penders was 82 years old?

(Testimony of Dr. Hugh F. Dormody.)

A. Oh, I beg your pardon. That is Mr. Penders, was 79.

Q. Oh, yes, that's right.

A. Mrs. Penders was 77.

Q. That's right. That's better. Mr. Penders at that time was 79 years of age. Correct?

A. That's right.

Q. And, of course, the calcium in the bones, the bones become more brittle as you get older, is that correct?

The Court: What is that? I didn't hear.

Mr. Scholz: Pardon?

The Court: I didn't hear your question.

Mr. Scholz: I say the calcium decreases and the bones become more brittle as you grow old.

The Witness: Are you asking me or telling me?

Mr. Scholz: It's an oratorical question, Doctor. You may answer that. It's really a question. I'm not a doctor. [36]

A. Well, it's true that the healing process at older ages is not as astute as it is at younger ones, if that answers your question.

Q. And the injured, fractured leg of Mr. Penders was immobilized in four months, is that correct? A. That's right.

Q. And, Doctor, were you at the hospital every day from May 11, 1946, to May 24, 1947?

A. Pardon me. I was. I lived there.

Q. Now, Doctor, Mrs. Penders left the hospital on May the 24th, 1947, according to your statement.

(Testimony of Dr. Hugh F. Dormody.)

I think you will find my statement is true. Is that correct?

A. She left the hospital on the 24th of March, 1947?

Q. That's right. And then when she came back, she had pneumonia?

A. I think she left the hospital on the 25th of March.

Mr. Scholz: Well, you told me the 24th of March, Mr. O'Donnell. All right, it makes not much difference. 25th of March, she left the hospital on the 25th of March according to your records?

The Witness: That is correct.

Q. And when she returned on April 17, 1947, she had pneumonia? A. Yes, sir.

Q. Now, that could have developed during the period that she was home?

A. Well, it, it, develop during the time from the time she left the hospital until she returned?

Q. Yes. In other words, an elderly person like that can get pneumonia and it can develop very quickly, can't it? A. Yes. [37]

Q. And then with proper care, in other words, if you see the pneumonia patient immediately and inject penicillin, you can stop it within a week?

A. Well, her pneumonia was a combination of factors. It was a pneumonia superimposed upon a more or less chronic passive condition of her lungs due to a threshold uremic state and definite cardiac

(Testimony of Dr. Hugh F. Dormody.)

factor from being in bed in traction for over a year, you see.

Q. I know, but it is still pneumonia, isn't it, no matter what causes it?

A. Well, yes, but your question was with regard to penicillin. There are only certain types of pneumonia that penicillin is effective on.

Q. Well, then, I understand, Doctor, that penicillin wouldn't have been effective in this case?

A. Could have only been effective in the event that there were certain organisms that respond to pencillin independently, superimposed upon the pre-existing condition.

Q. Doctor, you are arguing the difference with me. I asked the question: Is it your statement that the penicillin wouldn't have been effective in this case?

A. Penicillin was given in this case and did have some beneficial effect.

Q. How soon after the pneumonia developed, was this penicillin given?

A. It was given on the 17th when she returned to the hospital.

Q. And you don't know the date that developed?

A. The pneumonia? [38]

Q. Yes.

A. Not the complete consolidation.

Mr. Scholz: That's all, Doctor.

(Testimony of Dr. Hugh F. Dormody.)

Re-Direct Examination

By Mr. O'Donnell:

Mr. O'Donnell: I just want to ask the Doctor one more question about another X-ray, and I will ask leave at this time, Your Honor——

The Court: All right.

Mr. O'Donnell: ——as part of my case.

Q. Doctor, was any X-ray taken after the removal of the traction? A. Yes.

Q. ——from Mrs. Penders' leg? A. Yes.

Q. Have you a picture here?

A. Yes, I have. These show very nicely what counsel is trying to bring out. Decalcification has taken place. This——

Q. Just for the purpose of the record you have an X-ray here and what does that X-ray disclose?

A. This anterior-posterior view of the left femur and the knee-joint.

Q. When was it taken, Doctor?

A. That was taken on the 31st of January, 1947.

Q. And that was taken after traction was removed?

A. That was taken after the traction was removed, at the time the traction was removed.

The Court: What was that date again?

The Witness: January 31, 1947.

Q. And will you tell us what that X-ray discloses, Doctor? [39]

A. The X-ray shows the degree of union that has taken place. This is new bone thrown down

(Testimony of Dr. Hugh F. Dormody.)

here. It shows that these two fragments, the split of the distal fragments, the two halves are in good position. The contour of the knee-joint from, from external, externally was without deformity.

Mr. O'Donnell: I see. And I would like to ask that this be introduced in evidence and marked——

A. (Continuing): It also shows a, a moth-eaten appearance of the bone here which is due to, to a condition known as osteoporosis or re-absorption of the calcium that is laid down in the bone leaving just a fibrous structure in there.

Mr. O'Donnell: I will ask that it be introduced in evidence and marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 14 in evidence.

Q. Do you have another X-ray, Doctor?

A. Yes.

Q. And when was that taken?

A. Taken the same date and is the lateral view of the left knee-joint and left femur showing the old fracture with a great deal of, of absorption of calcium leaving what is commonly spoken of as an egg-shell type of bony structure.

Mr. O'Donnell: Now, I ask that this be introduced in evidence, may it please the Court, and marked Plaintiff's Exhibit 15.

The Clerk: Plaintiff's Exhibit 15.

A. (Continuing): The other important thing is, here is practically [40] complete loss of cartilaginous surface to the weight-bearing area of the

(Testimony of Dr. Hugh F. Dormody.)

knee-joint with ankylosis of the knee-cap to the lower end of the femur.

Q. Tell me, Doctor, can you tell us: Would Mrs. Penders have been able to walk on that leg again?

A. I doubt it very much. I think the leg would have collapsed, at least any turn or twist or slight torsion due to trauma would have caused it to re-fracture.

Mr. O'Donnell: Any further questions?

Mr. Scholz: Yes.

Mr. O'Donnell: Will you step up to the witness stand again, Doctor?

Re-Cross-Examination

By Mr. Scholz:

Q. Couple more questions, Doctor. Doctor, you, of course, got a medical history of Mrs. Penders, did you not? A. Yes.

Q. And what did her medical history show?

A. The only thing of importance in her medical history, as I recall now—I haven't it with me—was that many years previously, while a resident here in San Francisco, she had had some trouble with her rectum and hemorrhoids and approximately twenty-five years prior to the time I saw her, she had been treated here for some trouble with her cervix and radium emanation seeds, I believe, had been used in the treatment of a cervical condition that she had.

Q. Doctor, would you mind sending that report to Mr. O'Donnell [41] and let me see——

(Testimony of Dr. Hugh F. Dormody.)

A. I was under the impression that he had it.

Mr. Scholz: Oh, have you got it?

Mr. O'Donnell: No, I haven't. I haven't got it, Doctor.

Q. Would you do that so you won't have to come up again?

A. Yes, I can write it all down for you right now.

Q. Well, I would like to see the written report.

A. Those are the complete highlights to her condition.

Q. Would you do that, Doctor, then?

A. Very glad to.

Mr. O'Donnell: That's all.

Q. Did you also get a medical history of Mr. Penders?

A. Only highlights of his lifetime in which the only thing of importance was the fact that he had had this congenital anomaly of his forearm and hand but he had been essentially a healthy and well man all his life.

Q. That was rather a quick recovery, considering his age, I mean the treatment to the leg, wasn't that, Doctor?

A. I think he is in remarkably good health now for his age but that he does have these two things which constitute a disability which will not improve. He will have those the rest of his life.

Mr. Scholz: That's all, Doctor.

Mr. O'Donnell: That's all, Doctor. That is all.

(Witness excused.) [42]

Mr. Scholz: Does Your Honor wish me to make a brief opening statement now?

The Court: Yes, I would like to hear it to get the facts of the case.

Mr. Scholz: At this time, Your Honor, we will stipulate that the driver of the Government car was acting in the line of duty. I think we denied it in our answer, did we not? At the time I filed the answer, we did not have all the information. But that is the fact that he was acting in the line of duty, which means, of course, in the scope of his employment.

The Court: In other words, it's stipulated that the driver of the car, of the United States car was acting within the line of duty and within the scope of his employment.

Mr. Scholz: The Government vehicle was going west towards Monterey on Fremont Street. He was traveling approximately 35 to 40 miles an hour, and in the outer lane. Just prior to the impact, Mr. Penders, who was driving a green sedan, I think a Hupmobile 1934, was driving east on Fremont Street or Fremont Extension, they call it, too, and on the wrong side of the highway. He had crossed over from the south side of Fremont Street over to the north side of Fremont Street approximately a hundred feet before he reached this intersection and was traveling on the wrong side of the street at the time that the Government vehicle or driver saw [43] him and that the Government driver, of course, did all he could to avoid a collision

and could not do so, that the collision of the two automobiles happened approximately here. In other words, before——

Mr. O'Donnell: Indicating—indicate for the purpose of the record, will you?

Mr. Scholz: On the diagram—which I think we ought to offer for identification purposes at this time, unless you want to stipulate?

Mr. O'Donnell: It can go into evidence.

Mr. Scholz: Yes. May I interrupt, Your Honor, by offering this diagram in evidence and mark it Defendant's Exhibit——

The Court: Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A in evidence.

Mr. Scholz: Referring to Defendant's Exhibit A, the collision occurred at, approximately at the spot that's designated on the diagram as "edge" being part of the words "edge of the pavement." That is the defense in brief. Of course, there will be a great deal more extenuating, I mean circumstances that we offer but that is the defense.

Mr. O'Donnell: Now, may it please the Court, we practically have the Monterey Police Department here with us today and I was just wondering if I could call some of those officers out of order so that we can get them back on their [44] jobs.

The Court: Yes. I would like to say this in that connection, that I have to be in Oakland at four, so I was going to ask you gentlemen when we recess at twelve that, if it is convenient, we come back at

one-thirty because I would like to leave here at three-thirty.

Mr. O'Donnell: That's fine.

CHARLES E. SIMPSON

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles E. Simpson.

The Clerk: Thank you.

The Court: Charles E. what?

The Clerk: Simpson.

The Witness: Simpson. S-i-m-p-s-o-n.

Direct Examination

By Mr. O'Donnell:

Q. And, Mr. Simpson, you are a member of the Monterey Police Force? A. Yes.

Q. And serving in the capacity of sergeant, is that correct? A. Yes, sir.

Q. And were you a duly-appointed and acting member of the Monterey Police Department on May 11, 1946? A. Yes.

Q. And calling your attention to approximately seven o'clock on [45] that day, were you called to Fremont Avenue and Park Avenue in Monterey?

A. Yes, I was.

Q. And upon arriving there, would you tell us what you observed, if anything?

A. I observed two vehicles that had been in a

(Testimony of Charles E. Simpson.)

collision and I observed a white ambulance that was leaving the scene just as I arrived.

Q. I see, and after arriving at the scene of this particular accident, what, if anything, did you do?

A. I was called to the scene by Lieutenant Marinello for the purpose of taking photographs of the vehicles that were at the scene that had been in the collision.

Q. And did you take your photographs, any photographs at that time? A. Yes, I did.

Q. Have you brought those photographs with you? A. Yes, sir.

Q. I will ask you to compare the photographs that I have handed you with those in your possession—and, incidentally, those that are in your possession, are the official records of the Monterey Police Department?

A. Yes, sir, I am the superintendent of records for the department.

Q. I will ask you whether the large copies I have handed you are true and correct copies of those in the possession of your department?

Mr. Scholz: May I shorten this? I have some copies here I think were taken by you, Sergeant, and can he compare them? I think we can stipulate to them. [46]

Mr. O'Donnell: Oh, fine.

A. Yes, all right, fine. They are the same here, each for each enlargements and the small copies which are our official record.

(Testimony of Charles E. Simpson.)

Mr. Scholz: Now, this one, I have that one, I have that one.

A. (Continuing): I have the negatives here that were taken at the time. Different distances, same view.

Mr. Scholz: This one I have. These are the same, aren't they?

The Witness: Now, these are.

Mr. Scholz: No, they are not.

The Witness: They are not taken at the same time. They are taken at a slightly different distance.

Mr. Scholz: I have copies of the print of the negative on that and I'll stipulate——

Mr. O'Donnell: They are all correct.

Mr. Scholz: They were taken at that time, taken by the sergeant.

Mr. O'Donnell: Yes. Let's take these in order.

The Court: Were you a sergeant of police at the time you took the pictures?

The Witness: Not at the time.

The Court: What was your rank then?

The Witness: I was a police officer.

The Court: Police officer. [47]

Q. I show you here a photograph and ask you if you took that photograph? A. Yes, I did.

Mr. O'Donnell: May I? Just for the purpose of the record, if I may, I'll ask this be introduced into evidence for identification. It can go into evidence, I guess, and be with the stipulation.

(Testimony of Charles E. Simpson.)

The Court: Why don't you introduce all of them as long as you have them?

Mr. O'Donnell: As one exhibit?

The Court: I understand——

Mr. O'Donnell: I was going to explain these different——

The Court: Oh, I see. Then I guess you better introduce one at a time. Otherwise, you want to explain——

Mr. Scholz: What exhibit is it now?

Mr. O'Donnell: This is Exhibit 16.

The Clerk: Exhibit 16 in evidence.

Q. Showing you Plaintiff's Exhibit 16, I'll ask you to tell us if you took that picture and, if so, what the same portrays?

A. Yes, I took that picture. Your Honor, may I refer to my original notes made at the time concerning these photographs?

The Court: Yes.

A. (Continuing): In my notes, I state that I took one of the start of the skidmarks, a time exposure from 40 feet. This series of photographs I started at 6:50 p.m. This was the first of the photographs, as I recall, and was made under conditions of some light. Photograph was intended to show the——

Q. Skidmarks?

A. Pavement at the beginning of the skidmarks, the general area of the beginning of the skidmarks.

Q. Can you point out to us whether or not any

(Testimony of Charles E. Simpson.)

skidmarks appear upon the face of that photograph?

Mr. Scholz: I object to that on the ground that the photograph is itself the best evidence as to whether any skidmarks appear on there, not his testimony.

The Court: Well, let me see that for a moment, will you?

The Witness: Yes.

The Court: Would you point out to me what you refer to as skidmarks in this?

The Witness: Yes, Your Honor.

Mr. O'Donnell: You will have to talk a little louder, Sergeant.

The Witness: The skidmarks in the photographs are evidenced by these dark lines that are broken in character, commencing here, extending to here, then a break, then here, then here again and then here.

Mr. Scholz: Now, for the purpose of the record, may I interrupt? I'm sorry. Are you indicating that those skidmarks are along that white line there? Is that the one?

The Witness: They are approximately parallel to the centerline, marking. [49]

The Court: Is that white line the centerline, the nearest one to the skidmarks?

The Witness: This is the centerline. The one nearest to the skidmarks is a dividing strip between the centerline and the north curbline.

(Testimony of Charles E. Simpson.)

The Court: Yes. Can you show me on that diagram where that picture was taken?

The Witness: Yes. (Witness steps down.)

Mr. O'Donnell: Have you a pencil?

The Court: This is Exhibit 16, isn't it?

Mr. Scholz: Yes, Exhibit 16, Your Honor.

The Clerk: Yes, sir.

The Witness: The camera was set up about the end of this white marking strip and pointed in this general direction. The pole noted here, you will refer, appears in the righthand edge of the photograph. That is this pole. The camera was turned in this general aspect.

Mr. Scholz: The pole that is indicated——

The Witness: The pole that is indicated on the map is the pole that appears in the photograph at the extreme right.

Q. For the purpose of the record, you better mark this pole "S-1". You are facing in a southeast direction, is that——

A. Yes, that's right, the camera was pointed approximately southeast. [50]

Q. And at the time the photograph was taken, your camera was in this position? A. Yes.

Q. Marked "S-2".

Mr. O'Donnell: Does that answer your query, Your Honor?

The Court: Yes.

Mr. O'Donnell: All right. Fine. Now, I want

(Testimony of Charles E. Simpson.)

to introduce this photograph in evidence and mark it——

The Clerk: Plaintiff's Exhibit——

Mr. O'Donnell: Plaintiff's Exhibit 17, isn't it? I will give it to you in a minute. That's it.

Q. I show you this photograph and ask you whether or not you can identify that picture?

A. Yes. This is one of the photographs which I took at the scene.

Q. Referring to your notes, can you step up again to the map and show us where you had your camera placed at the time that you took that particular photograph?

A. (Witness steps down): My notes indicate the positioning of the camera in relation to the vehicles, not in relation to the intersections. I may, I am a little loath to position the camera accurately without informing Your Honor of that fact. I have measurements from the camera to the vehicles. If I attempt to place the camera exactly accurately, I will then be in a position of placing the vehicles which I am not able to do from my measurements.

Q. All right. From that photograph—I will withdraw my question [51] until it meets with the approval of the Court—from that photograph, can you point out on the map the position of these two cars at the time that photograph was taken?

A. The Penders vehicle was approximately here.

Q. Will you mark it with a pencil, Sergeant? Here is a pencil. A. Yes.

(Testimony of Charles E. Simpson.)

Q. If you will.

The Court: What's that? The defendant's vehicle?

Mr. O'Donnell: No, Penders vehicle; that is the plaintiff's vehicle.

The Witness: Penders.

Q. Well, we will mark that "S-3" and that is the position of the Penders automobile as shown in Plaintiff's Exhibit Number 17, is that correct?

A. That's correct to the best of my recollection.

Q. Now, will you show us the position of the Government vehicle upon this map as shown by that photograph?

Mr. Scholz: I suggest that you designate that.

Mr. O'Donnell: Yes, "S-4".

Q. Now, I have noted that you have put the Government vehicle over the white marker on the westbound traffic on the north side of the highway?

A. That may be, that may be due to an interpretation of the scale. My recollection is that the rear of the vehicle was approximately in the center of that particular lane rather than extending over the—— [52]

The Court: You mean the rear of the Government vehicle?

The Witness: The rear of the Government's vehicle.

(The Court steps down.)

The Witness: As approximately indicated there.

Q. All right, that's——

(Testimony of Charles E. Simpson.)

The Court: This "S-4", that arrow indicates the——

The Witness: The direction.

The Court: The same with "S-3"?

The Witness: Yes, sir.

(The Court returns to bench.)

Mr. O'Donnell: I will introduce this into evidence and mark it, this photograph, and it will be marked——

The Court: Eighteen.

Mr. O'Donnell: Eighteen. Plaintiff's Exhibit 18.

The Clerk: Eighteen in evidence. Have you got 16 there?

Mr. O'Donnell: Did he have sixteen?

The Clerk: Never mind. I'll get it later.

Q. I show you photograph marked Plaintiff's Exhibit No. 18 and ask you if that is a photograph, one of the photographs you took on that particular evening?

A. Yes, I took this photograph.

Q. And calling your attention particularly to where one of the officers is writing: what is he writing on?

The Court: I didn't see that seventeen.

The Clerk: I'm sorry. [53]

Q. What is that object on which he is writing?

A. I believe that is a portion of the front seat of the Government vehicle.

Q. I see. Now, when you were there, did you observe whether or not the seats were thrown out of the vehicles?

(Testimony of Charles E. Simpson.)

A. The seat was on the pavement.

Q. And do you know the other officers, the names of the officers appearing in that photograph?

A. Yes, the officer writing on the paper, on the seat is Lieutenant Marinello and the officer holding the end of the tape, appearing in the left of the picture, is Officer Davenport, and the officer walking with the flashlight was Officer Betancourt.

Mr. O'Donnell: I would like to introduce another photograph, may it please the Court?

The Clerk: Plaintiff's Exhibit 19 in evidence. Those are all of them.

Q. All these photographs were taken there approximately the same time, just from different places?

A. They were taken one immediately after the other.

Q. I see. Now, I am going to ask——

Mr. O'Donnell: Does Your Honor want to see this before I question the witness?

The Court: Yes. That object there in front of the Penders automobile is a seat from the Government automobile?

Mr. O'Donnell: I think it's out of the Penders car, Your Honor. That's out of the Penders car. Here's the [54] Government, see, the jump seats?

The Court: Yes.

Q. Now, I will ask you to step down to the map again with your notes, if you will, Sergeant?

A. Yes. (Witness steps down.)

(Testimony of Charles E. Simpson.)

Q. And referring now to Plaintiff's Exhibit No. 19, are you in a position to show us the position where your camera was when that was taken?

A. My notes indicate that was taken facing the left side of the vehicles from Fremont Street looking east at a distance of about 25 feet.

Q. Would you mark on the map just where that would be? Want the ruler?

A. That's all right.

Q. We will mark that "S-5". Now——

Mr. Scholz: "S-5" indicates the position your camera was when you took Exhibit 19?

Mr. O'Donnell: Nineteen, yes.

Q. Now, Exhibit 19, would you mark out on the map here the position of those cars as shown by that exhibit?

The Court: Is that——

Mr. O'Donnell: That's nineteen, yes.

A. By reducing the scale somewhat, as about that, the cars were virtually, not actually in physical contact. The rear of the Penders vehicle was almost touching the, the Government vehicle on the, on the left side, front, right there. That was, the vehicle was in, on the curb, the Government vehicle was a short distance away from the curb. [36]

Q. Now, I asked you the last question, was not the rear of the Government vehicle north of the dividing line of the highway on the westbound traffic lane?

(Testimony of Charles E. Simpson.)

A. Yes, one of the photographs will demonstrate that. Which one——

Q. You will just testify, you will testify from Exhibit 17 that the rear of the vehicle was over this white line? I am just trying to clear up the discrepancy. Want me to show you those others—can I show you 17? Can I have 17, Mr. Clerk?

The Court: I think I have it here.

The Witness: The photograph with the other officers in the picture is the one I would like to see.

The Court: Is that seventeen?

Mr. O'Donnell: Yes, that's 17. You don't want 17. You want 18, I guess.

The Court: That's 18.

The Clerk: Yes, sir.

A. That's correct. You will note the distance between the rear of the Government vehicle and the white line in the photograph is just about the width of the man standing——

Q. I see. I just wanted to clear up that little discrepancy. You see I had in mind there the rear of the Government vehicle was over the white line but it's not sitting on the white line.

A. About eighteen inches.

The Court: Well, the vehicle wasn't moved when you took these various pictures? [56]

The Witness: That's right. That's right. We can place the rear of this vehicle by the scale of this map actually about there, about 18 inches from the centerline.

(Testimony of Charles E. Simpson.)

The Court: Not as good here. S-4.

Mr. Scholz: That is S-4.

The Court. Yes.

The Witness: The original sketch we started here and run it to scale would be—that is about the best I can do as far as that is concerned considering the scale of the map.

Mr. O'Donnell: All right, will you just take the stand again? Introduce this into evidence and marked——

The Clerk: Plaintiff's Exhibit 20.

Mr. O'Donnell: Twenty.

Mr. Scholz: No, that's Exhibit 17. Same thing.

Mr. O'Donnell: Let me see 17. No, that's another one. This is a close-up. They got the camera about——

Mr. Scholz: Is this 20?

Mr. O'Donnell: That's 20 there. The one with the camera—now I show you here. You want to look at that a moment?

The Court: What is this?

Mr. O'Donnell: 20, Exhibit 20.

The Court: I think——

Mr. O'Donnell: This is a close-up. I just want to ask him to identify the cars. [57]

Q. Which one is the Government car in that photograph?

A. It is the vehicle appearing at the left of the photograph as you face the photograph.

Q. And the other car is the Penders vehicle, is it? A. Yes.

(Testimony of Charles E. Simpson.)

Q. And this jump seat, do you know now whether that is out of the Government car or not?

A. I would say that it was out of the Government car from my own knowledge because it was a matter of interest and I looked.

Q. I see. Fine. Now, I have here two photographs—(counsel conferring, not audible to reporter).

The Court: Would it be all right now if we take the noon recess?

Mr. O'Donnell: All right, Your Honor.

The Court: Because I am expecting a telephone call.

Mr. O'Donnell: All right. Fine.

(Noon recess, 12:00 to 1:30 p.m.)

Mr. O'Donnell: Sergeant, I presume Mr. Scholz has some questions.

Mr. Scholz: No, I think—no, I have no questions.

The Court: No cross-examination.

Mr. O'Donnell: I see. No cross-examination so—thank you, Sergeant.

(Witness excused.)

Mr. O'Donnell: Now, for the assistance of the Court, may it please the Court, I have had two photograps made, one [58] looking easterly towards the scene of the accident and one looking westerly, which I have shown to Mr. Scholz, and it has been stipulated that the same might go into evidence so

at this time for the purpose of the record, I want to introduce this photograph, which is looking easterly on Fremont Street towards the scene of the accident.

The Clerk: Plaintiff's Exhibit 21 in evidence.

Mr. Scholz: The only thing is, Your Honor, I reserve the right to show that there are any changes from the time the photograph was taken to the time of the accident. In other words, this was taken much later and I reserve the privilege to offer any evidence if it develops——

The Court: That is looking easterly?

Mr. O'Donnell: That is looking——

The Court: That is, the direction in which Penders car——

Mr. O'Donnell: That's right, Your Honor.

Mr. Scholz: That's right, Your Honor. Looking this way, Your Honor. That's the Del Monte Hotel up here, and——

Mr. O'Donnell: And I have another photograph looking westerly along Fremont Avenue or Street.

The Court: Well, is this 21, Exhibit 21, looking easterly just before you come to Park Avenue?

Mr. O'Donnell: That's it.

The Court: Park Avenue is on the left there?

Mr. O'Donnell: Park Avenue is on the left there.

The Clerk: The second photograph is marked Plaintiff's Exhibit 22 in evidence.

The Court: And this is looking westerly.

Mr. O'Donnell: Yes, Your Honor.

WILLIAM A. DAVENPORT

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. O'Donnell:

The Clerk: Will you state your name, please?

The Witness: William A. Davenport.

Q. And where do you reside?

A. Pacific Grove. 605 17th Street.

Q. And at this time you are connected with the California State Highway Patrol, is that correct?

A. That is correct.

Q. On May 11, 1946, what was your occupation?

A. I was a patrolman on the Monterey Police Department.

Q. Now, calling your attention to May 11, 1946, at or about the hour of 6:30 or 6:45 of the evening of that day, were you called to the vicinity of Park Avenue and Fremont Extension in Monterey?

A. I was.

Q. And upon arriving at that location what, if anything, did you observe?

A. We observed an accident had taken place there between an Army truck vehicle and a private automobile. [60]

Q. And what was the condition of the weather on that day?

A. May I look at the——

Q. Yes, you may refresh your memory from your notes. I understand that you are refreshing

(Testimony of William A. Davenport.)

your memory from notes made at the time that you arrived at the scene of the accident, is that correct, which are the——

A. These are the notes which were taken down and transcribed to this piece of paper or our actual report form immediately following the accident.

Q. And the records you have in your hand are the official records of the Monterery Police Department, are they? A. That is correct.

Q. I see. Fine.

A. The weather was clear that night according to my report here.

Q. The weather was clear and was it dark or light?

A. As I remember, it was still daylight when we arrived. It got dark before we finished our investigation of the accident.

Q. And at that time we had daylight savings or do you remember? A. I don't remember.

Q. You don't remember that. Now, upon arriving at the scene of the accident what, if anything, did you do?

A. The ambulance was there at the scene when we arrived and was taking care of the injured parties, removing them, the other officers, Lieutenant Marinello and Officer Betancourt and myself were the first to arrive representing the Police Department, I believe. We proceeded to assist in getting the injured out and taking measurements [61] and getting the accident scene cleared away from the highway.

(Testimony of William A. Davenport.)

Q. Now, how many injured people did you observe there at that particular time, if you remember?

A. There weren't as I remember all there at the time.

Q. I see.

A. Some had been removed previous to our arrival, that is, as my memory stands up.

Q. I see.

A. However, I have a list of the injured here that we took at the time of the accident.

Q. And will you read that list from your records?

A. Mr. Walter L. Penders, Mrs. Flora E. Penders, Mrs. Cathleen V. Hunt and Mr. David E. D-e-l-i-n.

Q. Edlin?

A. Edlin. Private Carl B. Wanless, Private Arthur Dobkins.

Q. I see.

A. And that was the list that I copied that night.

Q. And after you completed your task of assisting the ambulance crew, you stated you proceeded to take measurements? A. Yes, sir.

Q. And were you assisted by anyone in taking the measurements?

A. I assisted, or we all worked together. Officer Betancourt, Lieutenant Marinello and myself with the assistance of Officer Simpson taking the pictures.

Q. And, now, what measurements did you take on that day?

(Testimony of William A. Davenport.)

A. I have a, a diagram here drawn by Lieutenant Marinello in conjunction [62] with myself. We worked together on this. Which has all of the measurements that we were able to obtain that night.

Q. Now, using—may I see that—now, using this diagram that was made as appears on the notation there on it at the time, started at 8:15 p.m. and completed on 9:20 p.m. on May 11, 1946, did you observe any skidmarks on Fremont Avenue in the vicinity of Park Avenue? A. Yes, sir.

Q. And would you mind stepping down here before Defendant's Exhibit A and—are you familiar with the diagram on the blackboard here?

A. I think it's very similar to ours.

Q. I see. And would you show us where you found skidmarks?

A. Well, the skidmarks were intermediate, intermediate skidmarks from the Army vehicle. They weren't one continuous black mark. They were broken marks but not, apparently applied his brakes several occasions to stop from, prevent his hitting the other automobile. They weren't one black track but they continued that way for 102 feet from the point of impact to the vehicle.

Q. From the point of impact?

A. To the point of impact, I should say.

Q. Are you familiar—the scale of this map is 20 feet to 1 inch, and if I might have that ruler again, Mr. Clerk—can you mark out there, bearing in mind that the scale on this particular map, which

(Testimony of William A. Davenport.)

is Defendant's Exhibit A, where you saw these, observed these intermittent skidmarks that you have told us about?

A. I just wonder—they would run to—this would be the Government [63] vehicle, S——

Q. Let me put it to you this way before I ask that question to make it easier for you: Can you mark on that map, just as Sergeant Simpson has done, and if you agree with him, you can use the same diagram, the same location, where the measurements were when you arrived at the scene of the accident?

A. Well, the vehicles, the front, you can see from where the Government vehicle, but our measurements was 53 feet and 10 inches from this point of the center of Park Avenue at a point which I believe it would be probably a little farther.

Q. All right, let's take the ruler here now. That's fifty——

A. 53 feet and 10 inches.

Q. From the——

A. From the center-most point of Park Avenue.

Q. O.k. We'll mark that 1-D. How many feet was that again now?

A. 53 feet and 10 inches.

Mr. Scholz: I suggest that it would be better if you marked it yourself.

Mr. O'Donnell: I was just trying to, taking——

Mr. Scholz: ——because I don't think they might agree *agree* with the photograph.

(Testimony of William A. Davenport.)

The Witness: One inch is equal to 20 feet?

Mr. O'Donnell: One inch is equal to 20 feet, so it would be 2 inches.

(Witness at blackboard, few words inaudible.)

Mr. O'Donnell: Well, someone said less than a quarter. [64]. Make it three-sixteenths.

Q. All right, now. That spot you marked on the board and that pencil mark, what does that indicate?

A. That would indicate——

Q. The position of what?

A. The right front end of the, Mr. Penders' car. No, excuse me, the military police vehicle.

Q. All right, the right front. In what direction was that facing at the time? May I have those photographs—maybe we can, for the purpose of——

A. Facing generally north, northeast on our diagram here.

Q. Northeast. All right. Will you draw a little parallelogram in a northeast direction there indicating—all right, we will mark that 2-D, which indicates the position of the Government car, is that correct?

A. As near as I can determine, yes.

Q. And that was—for the purpose of refreshing my memory—how far from point 1-D here?

A. 53 feet and 10 inches.

Q. 53 feet and 10 inches. Now, from your notes, can you tell us the position of the Penders automobile? If you can, just tell us.

(Testimony of William A. Davenport.)

A. Oh. Would you repeat that again?

Q. Can you tell us the position of the Penders automobile?

A. The Penders automobile, the rear of the Penders car was just, left side, or towards the front, the left front of the military police vehicle facing generally a northwesterly direction.

Q. All right. Now, will you draw a parallelogram on the map [65] indicating the position as your notes disclose—the position of the Penders car?

A. Doesn't seem to be exactly the diagram here. We don't have this shoulder or unimproved section that you have on your map.

Q. On your map?

A. It's not shown on my map so there may be some little confusion there as to, in my mind, relative to the position of the cars to that section there.

Q. I see.

A. I think Lieutenant Marinello may be able to straighten that out a lot more clearly.

Q. I see. Well, we will mark this as the position of the Penders car as D-3. Now, let's get back to the skidmarks again. You have placed the position of the Government car. Now, how far east of the Government car, the position of the Government car, when you arrived at the accident, did these intermittent skidmarks extend?

A. For a distance of 102 feet.

Q. So, taking the ruler again—all right. Now

(Testimony of William A. Davenport.)

you have drawn a line on the map from the position of 2-D which is the position of the Government's car after the happening of the accident to a point which I have marked D-4, which indicates the distance over which the skidmarks extend intermittently, using your expression.

Mr. O'Donnell (as Court steps down): You want me to make that dark, Judge?

The Court: I can't see from up there.

Mr. O'Donnell: I'm sorry. Is that o.k.? [66]

The Court: Yes.

Mr. O'Donnell: All right. Now, if you will just take the stand again, will you?

(The Court and the witness return to seats.)

Q. Now, you made other measurements at that time, other than skidmarks? A. Yes, sir.

Q. And what other measurements did you make, Mr. Davenport?

A. We have measurements of the width of that half of Fremont Extension; in other words, from the double white line to the curbline of the Extension, of Fremont Extension.

Q. I will have to ask you to step down here again and if you will just indicate again where your measurement——

A. We measured from the continuation of the curb-line on Fremont up on to Park, from there to the double white line here.

Q. I see.

A. In other words, we weren't, we didn't include

(Testimony of William A. Davenport.)

the other half. All the activity took place on the——

Q. North side of the highway?

A. North side of the highway.

Q. I see. And continuing the curb-line of Fremont Avenue west, east of Park Avenue up to the middle of Park Avenue, what was the measurement from there to the center of the highway?

A. Thirty feet.

Q. Thirty feet? A. Yes.

Q. All right. Now, what other measurements did you take, if you remember?

A. The width of Park Avenue, which as I remember correctly, if I remember correctly, was, just a moment, [67] the width of Park Avenue at the widest point at that intersection which we determined to be fifty feet.

Q. Well, are you—at its widest point, in other words?

A. Would be a point as I remember it right, I'm not, not, I can't be accurate on that.

Q. But as Park Avenue enters into Fremont Extension, it widens, does it?

A. That's right; yes, sir.

Q. In other words, it has a broad curve towards the west, isn't that correct? A. Yes.

Q. And there is a dog-leg, so to speak, just east of Park Avenue? A. On Fremont, yes.

Q. On Fremont. What is the contour of the road, that is, going east on Park Avenue towards, on Fremont Street towards Monterey?

(Testimony of William A. Davenport.)

A. That is upgrade.

Q. That is upgrade?

A. To the, up to the eastern edge of Park where it more or less levels off again.

Q. And is the road straight there or does it make any slight turn of any kind?

A. Fremont Street makes a dog-leg, as you named it, to the left as you are traveling east, that bend makes its sharpest point right about where Broadway enters Fremont.

Q. Park enters Fremont?

A. Excuse—Park enters Fremont.

Q. And is Fremont Extension east of Park Avenue level?

A. Well, comparatively level.

Q. May I see your notes just for this moment? Now, with relation [69]—if you don't remember this, you don't have to answer it—with relation to the curb-line on the north side of Fremont Avenue west of Park Avenue, can you tell us whether or not the Penders car was up over that curb-line or not?

A. I believe that the Penders car was not over the curb-line but up to the curb-line, if I——

Q. I see. Did you take the width of Park Avenue, save and except the position that you have point——

A. Only the distance between the center of Park Avenue to the eastern edge of Park Avenue.

Q. What was that distance?

(Testimony of William A. Davenport.)

A. 19 feet and 6 inches.

Q. And the widest part of Park Avenue where it enters Fremont Street, I think you testified, is 50 feet? A. That's correct.

Mr. O'Donnell: Just pardon me a moment. I think that's all.

The Court: Just read that last statement.

(Last question and answer read.)

Cross-Examination

By Mr. Scholz:

Q. Sergeant, you stated you took a list of the injured persons; you didn't know what the nature and extent of their injuries were, did you?

A. Only very little. We wrote up at the hospital but, of course, the doctors hadn't at all completed their diagnosis and we were only able to get very sparse information. [69]

Q. Did you make the report or did Lieutenant Marinello make a report on this written report?

A. Yes, sir; I wrote the report.

Q. You wrote up the report? A. Yes, sir.

Q. Have you got that with you?

A. Yes, sir.

Q. May I see it? Thank you. Sergeant, while Mr. O'Donnell is reading your report, do you want to take a look at Exhibit No. 16, the photograph—can be looking at that. Now, these reports that you handed me, Sergeant, they were made up shortly after the accident?

(Testimony of William A. Davenport.)

A. We came directly from the accident into the office and wrote all our reports.

Q. And then they were typed there?

A. Well, you will have to excuse the typing on that. I'm afraid I did that myself and I'm not a very——

Q. Well, I think it's very good. That's better than I could do. But I mean you typed these yourself? A. Yes, sir.

Q. And they are true and accurate——

A. Yes, sir.

Q. ——together with the copy of the accident report on the form provided by the State of California? A. Yes, sir.

Mr. Scholz: I offer these in evidence then, if Your Honor please. Do you want me to read them in?

The Court: You can read them.

Mr. Scholz: All right. I offer them as one exhibit.

The Witness: Those are borrowed from the files of the Monterey Police Department and they would like to have—— [70]

Mr. O'Donnell: I presume you can make copies of them.

Mr. Scholz: Yes, I think I will have some copies made. Can that be stipulated?

Mr. O'Donnell: That will be stipulated.

Mr. Scholz: I will have some copies made and then we will see that they are returned.

(Testimony of William A. Davenport.)

The Court: What exhibit is that?

Mr. Scholz: Defendant's Exhibit B, Your Honor.

The Court: C?

Mr. Scholz: B. May it be considered read in evidence then, Your Honor?

The Court: Yes. Do you mind—I would like to see them.

Mr. Scholz: Yes, I think it might be well.

Mr. O'Donnell: Both the reports and the cards have gone in as one exhibit, have they?

Mr. Scholz: That's right.

The Court (Pause): All right.

Q. Now, Sergeant, referring to Exhibit 16, which is the photograph, you note on that—you have seen that picture before?

A. I saw the smaller copies.

Q. You will note on that, there are some skidmarks designated and that the Sergeant indicated that they were almost parallel to that white line, which is the line separating the two lanes on the north side of Fremont, is that correct?

A. Yes, sir.

Q. And those are the skidmarks that you saw?

A. That's [71] right; yes, sir.

Q. Now, you note on there also some skidmarks apparently that turn into Park Avenue there?

A. Yes, sir. I noticed some marks on the road; yes, sir.

Q. That was skidmarks which were made, not caused by this accident?

(Testimony of William A. Davenport.)

A. No, that didn't have anything to do with the accident.

Q. And were they made that day?

A. I don't know, sir.

Q. Don't know. Well, now, the skidmarks that you saw, that you indicated on the diagram, do you know of your own knowledge whether they were made by this Army vehicle?

A. Well, sir, they, they, according to the testimony or statements of the driver of the Army vehicle at that time, which I don't know I am allowed to quote now or not, in his statements to us that he had applied his brakes in that way that we then followed those marks from their starting point to his vehicle and they lined up directly with the tires on his vehicle so they were determined then that they were his skidmarks as part of the accident.

Q. Now, you say that the driver of the Army vehicle was Wanless, did you not?

A. Yes, sir.

Q. You also stated that he was injured?

A. I might retract part of what I said there, if I may. I don't remember what the, whether it was he that said that or the other person that was with him. I remember one of them was injured and I don't remember which one it was that we were able to talk to at that time. [72] However, the skidmarks from their starting point, from our observation, I hesitate to state what was said that, at that time be-

(Testimony of William A. Davenport.)

cause it has been quite a period of time back and I, reluctant to say something that I can't back up but the skidmarks themselves were obviously fresh on the road by their texture and all and did continue from their starting point over the hill down in line with the other vehicle and ended at the wheelmark or wheels of the Government vehicle. As such, I feel that they, we, were determined that they were the skidmarks of that vehicle, the——

Q. In other words, you determined they were the skidmarks of this vehicle because they apparently were fresh skidmarks that had been made recently, is that right?

A. That's right. The other skidmarks that we saw there in the road as being thrown out were determined as not being part of it because of their texture. It was more or less obvious to myself that they had been there some time, whether that day or not, it's hard to determine, but they were not minutes old. They were apparently quite old.

Q. Now, the skidmarks indicated that the Government vehicle was proceeding west on Fremont Street, is that correct? A. That is correct.

Q. And that he was on the, they are in a lane, that is, the lane next to the double line, he was to the, closest to the double line, is that correct, until he started to turn off into [73] the, the north lane, outside lane, is that correct?

Mr. O'Donnell: You understand that question, Mr. Davenport?

(Testimony of William A. Davenport.)

The Witness: I believe I do.

The Court: Let the reporter read it to you again.

(Question read.)

Mr. O'Donnell: Oh, I suggest that question be reframed, may it please the Court.

Mr. Scholz: I have no objection.

The Court: Oh, yes.

Q. In other words, the skidmarks indicated the Government vehicle was traveling, before it started to make a turn, in the inner lane, that is, the lane closest to the double line, is that correct?

A. No, sir. As I remember, I don't think so. I believe that the Government vehicle was traveling in the outside lane next to the curb when it came around the——

Q. Now, you have drawn a line indicating a skidmark. Is that supposed to represent the left wheel or wheels of the Government vehicle or the right wheel or wheels?

A. Do you have the sketch there, sir?

Q. Yes, I am not trying to confuse you, Officer; I am just trying to get the facts.

A. Oh, I understand. I am trying—if you will bear with me—I probably sound confused.

Q. No, not at all.

A. I am trying to recall some of those things as you go along. As I remember the skidmarks, it showed [74] them from——

(Testimony of William A. Davenport.)

Q. Would a reference to Exhibit 16 help you?

A. I believe that there was only one distinct skidmark, not from both wheels and I'm not sure, I wouldn't want to say at this time whether it was the left or the right. However, I don't remember.

Q. In other words, as I understand you, you don't remember whether that skidmark was made by the left wheels or the right wheels?

A. No, sir.

Q. Did the direction of the skidmarks indicate that the Government vehicle was turning to the right or north?

A. At what time, sir? You mean, were they going to make a left turn before the accident?

Q. No. No, the question I asked, Sergeant, is this: Did the skidmark that you testified to show that the car was going to the north, that is, to the right, or to the north, in that general direction?

A. The skidmarks were generally in a straight line at an angle from the, the white line dividing the lanes to the, slightly to the north. I think, as I have drawn it there on the scale, on the——

Q. Now, you indicated that the skidmark was approximately, the end of the skidmark was approximately 22 feet north of the double white line, is that correct?

A. Well, you can determine that a little closer, the military, the front, the left front wheel of the military police vehicle at the final resting place is 8 feet and 8 inches from the curb, the skidmark ended [75] at the rear wheel of the vehicle.

(Testimony of William A. Davenport.)

Q. Which wheel? Which rear wheel, do you know?

A. Would be the right rear wheel, right rear of the vehicle.

Q. The skidmark ended at the right rear wheel. Then the skidmarks made were by the rear wheels of the——

A. I don't want to say that; no, sir.

Q. All right. I don't want you to say anything you don't want to.

A. The skidmarks are there, however. It doesn't necessarily—I don't know which one it was that made that. I can't answer that truthfully.

Q. I know it's quite difficult, Sergeant. I sympathize with you. By looking at Exhibit 16, would you not state that those skidmarks start from the white line, north of the double line and run approximately as far as that photograph is concerned, about 3 feet to the north?

A. I wonder if I could ask you to repeat that again.

Q. Yes, please.

(Question read.)

A. When you say "start from the white line north of the double line——"

Q. The white line which is the dividing line on the north, for the westbound traffic, that is what I mean. They start from that white line, do they not?

A. Very close to it; yes, sir.

(Testimony of William A. Davenport.)

Q. And the photograph indicates, does it not, that they branch off on a northwest by west direction? A. Yes, sir.

Q. And as far as the photograph is concerned, does it indicate [76] that they end about north 3 or 4 feet of the white line which divides the westbound traffic?

A. On the photograph, on the end of the photograph here you mean?

Q. Yes.

A. Well, I, I, it's hard to determine exactly the distance there from this photograph here.

Q. Well, what would be your—were you there when the photographs were taken, Sergeant?

A. I was working on other parts of the accident and I was not observing Officer Simpson at the time taking the pictures. In fact, I never saw the pictures until this, very recently.

Q. Sergeant, you mentioned that Park Avenue is 50 feet at the widest. Now, that's an odd-shaped intersection? A. Yes, sir.

Q. You note. And did you mean when you said 50 feet at the widest, did you mean from the east curb of Park Street to the point indicated here by the edge of the pavement and the curb?

A. You can observe here from our diagram more accurately at a point which would probably be the continuation of the inside of the sidewalk and continuing it out.

Q. Oh, I see.

(Testimony of William A. Davenport.)

A. No, sir; the other way. Up and down. North and south.

Q. Oh, you mean this way? A. Yes.

Q. Oh, I see what you mean. That's the way?

A. Up here right across. You see, from our—which is very similar but ours isn't to scale, the exact——

Q. Oh, I see. You took a prolongation of the——

A. Right here. [77]

Mr. O'Donnell: West of the curb-line.

Mr. Scholz: West of the curb-line.

The Witness: At an angle right here.

Mr. Scholz: Oh, I see. But the width from the east curb-line to the edge of the pavement there, well, that speaks for itself. Is approximately a hundred feet.

Q. You arrived there, Sergeant, about 6:41 p.m.?

A. Approximtaely. It's on the report there, I believe.

Q. Well, anyway, that's the date you arrived. I don't care—and did you have any discussion with anybody at the time of the accident?

Mr. O'Donnell: I am going to object to any dicussion, may it please the Court, unless the plaintiff was there. The discussion wouldn't be binding upon the plaintiffs in this action.

Mr. Scholz: Well, at the time the plaintiffs were there then.

The Court: Well, I think you ought to lay a foundation.

(Testimony of William A. Davenport.)

Mr. Scholz: It's a preliminary question. I don't know whether he had discussion or not. I just asked if he had any discussion.

A. We weren't able to talk very extensively to anyone there. As I remember, I believe that the one soldier had not been taken away yet and we were able to ask him—I don't remember any discussion pertaining to the accident at the time this accident, [78] about injuries, I think, one of the soldiers, I think, they were just getting ready to take——

Q. Your testimony then is to the best of your recollection, you don't remember discussing it with anybody at the time of the accident?

A. Not at the scene of the accident.

Q. That's what I meant; the scene of the accident.

Mr. Scholz: I think that's all.

Redirect Examination

By Mr. O'Donnell:

Q. Mr. Davenport, you have investigated many accidents during your police career, have you not?

A. Quite a few; yes, sir.

Q. And as a part of your work, you measure skidmarks? A. That is correct.

Q. And make a complete investigation as to all the surrounding circumstances?

A. As much as——

Q. Of every accident, do you not?

(Testimony of William A. Davenport.)

Mr. Scholz: I object to what he says they do, any other accidents.

Mr. O'Donnell: I want to clear it up now.

Q. Is there any doubt in your mind that the skidmarks about which you have testified here today which you say extend for 102 odd feet, are not the skidmarks from the Government vehicle?

A. I definitely stated they were the skidmarks.

Q. They were the skidmarks.

Mr. O'Donnell: I think that's all. [79]

Mr. Scholz: That's all, Sergeant. Thank you.

(Witness excused.)

Mr. O'Donnell: Now, you made a statement, I think you ought to have it in the record, from what point to what point Park Avenue at this intersection is 100 feet?

Mr. Scholz: I think I made a careful note, may be wrong. From the, from the east curbline of Park where the, the——

Mr. O'Donnell: That's the property line you are on now.

Mr. Scholz: Yes, the property line to the edge of the pavement is 4 and 4½, let's see.

Mr. O'Donnell: Let us stipulate.

Mr. Scholz: That would be about——

Mr. O'Donnell: Let us stipulate from A to B.

Mr. Scholz: It's here. You can figure it out.

Mr. O'Donnell: Is 90 feet o.k.?

Mr. Scholz: Don't mark it up.

Mr. O'Donnell: That's all right. I mean that's not important.

Mr. Scholz: I just want to know where he is measuring from.

Mr. O'Donnell: Mr. Hartshorn. [80]

EDWIN H. HARTSHORN

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

The Clerk: Be seated, please. Would you state your name, sir?

The Witness: Edwin Herbert Hartshorn.

The Clerk: Would you spell your last name, please?

The Witness: H-a-r-t-s-h-o-r-n.

Direct Examination

By Mr. O'Donnell:

Q. Mr. Hartshorn, where do you live?

A. I live at 150 10th Street, Pacific Grove.

Q. And what is your business or occupation?

A. I am a bus-driver, sir, at the Bay Rapid Transit Company in Monterey.

Q. And the Bay Rapid Transit Company is a passenger——

A. It is a city line, transit company.

Q. Oh, city transit company? A. Yes, sir.

Q. And that's the city of Monterey, Pacific Grove?

A. That takes in Monterey, Pacific Grove and Carmel——

(Testimony of Edwin H. Hartshorn.)

Q. And how long have you been in their employ?

A. I have been there now three years as of the, March 28th this year.

Q. And you were employed as a bus-driver by that concern on May 11, 1946, is that correct?

A. No, sir, I was employed there March 28, 1946.

Q. I see, but you were so employed on May 11?

A. Yes, sir; I was there; yes, sir. [81]

Q. 1946. And on May 11, 1946, what was your run?

A. It was the Fremont Extension run, sir. It's Route 7.

Q. And by the Fremont Extension run, do you run over and across Fremont Extension?

A. Yes, sir.

Q. And do you pass the portion of Fremont Extension where Park Avenue enters Fremont Extension? A. I do, sir.

Q. And you are familiar with the contour of the ground there at that particular location?

A. I am, sir.

Q. Have you worked continuously on the run Number 7, that is, the Fremont Extension run?

A. At that time I had; yes, sir.

Q. You are not on that run any longer?

A. I am not any longer, no.

Q. Now, you say you operate a bus. Do you drive the bus? A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. And I presume it is similar to a San Francisco bus. You collect fares?

A. Yes, sir, we handle the cash, everything. It is one-man operated.

Q. One-man operated? A. Yes, sir.

Q. And how big are these busses?

A. They are 27 passengers.

Q. Twenty-seven passengers. Can you tell us approximately how high you sit above the ground when you operate one of those busses?

A. That particular bus, the bus No. 65, it clears, my vision is clear out of the window, that is, out looking through the window is just about 8 feet. I measured it. [82]

Q. So you are elevated 8 feet, is that correct?

A. That's right.

Q. From this point of vision?

A. In that particular bus; yes, sir.

Q. And you remember on May 11 you were operating this particular bus, is that correct?

A. Yes, sir; I was.

Q. Now, on May 11 at or about 6:40 p.m. of that day did you witness an accident at the point on Fremont Avenue where Park Avenue enters into—or Fremont Extension, rather? A. Yes, I did.

Q. You did. Do you know Mr. Penders, the plaintiff in this action? A. Yes, sir.

Q. Walter Penders. And you became acquainted with him since the happening of this accident?

A. That's right, sir.

(Testimony of Edwin H. Hartshorn.)

Q. And, now, you subsequently learned he was operating an automobile on that day?

A. Yes, sir.

Q. Where was Mr. Penders operating his automobile on Fremont Extension when you first observed his car?

A. He, he was in my lane. I was on the outside lane going eastward on Fremont Extension and he was in front of me at that time.

Q. At that time? A. Yes, sir.

Q. And approximately how far west of Park Avenue was it when you first observed Mr. Penders' car in the outside lane traveling east?

A. Well, I would say it was about 300, three to four hundred feet west of the intersection, pardon me, the intersection across the street from Park Avenue. [83]

Q. I see.

A. There is a, there is a side street in there. I forget the name of it now.

Q. That's the side street. What is the name of that——

A. Yes, sir, it's practically down, there's Monterey College there, there's an intersection that goes into Monterey College there, I mean it was there, it was there at that time.

The Court: Approximately 400 feet west of the intersection on that map?

The Witness: Yes, sir. There's an intersection down there now about where your finger is now.

(Testimony of Edwin H. Hartshorn.)

Q. That is just about where you first observed it in the outside lane traveling east?

A. Yes, sir.

Mr. Scholz: That's Augussita.

Mr. O'Donnell: No, he's talking about something different. He is talking about something different.

Mr. Scholz: All right.

Q. Now, will you tell us what you observed in the operation of Mr. Penders car after you first saw it at the place that you have already indicated?

A. Well, I was going the same direction and he cut over into the second lane, the inside lane.

Q. That would be next to the double line?

A. Yes.

Q. Dividing the highway?

A. That's right, and he went on up the street, this, I should say about to the end of that intersection on the upper side of the intersection. There's a golf course there on the righthand side. [84]

Q. That's the Del Monte Golf Course?

A. I don't know the name of the street, I can't remember it now, and then he cut over across the white line and I noticed an Army vehicle coming down the street.

Q. Now, just before we get to that; now, as you—can you step down here, if you will?

A. Yes. (Steps down.)

Q. I don't think you have seen this map before?

A. Yes, sir. I was studying it this morning.

(Testimony of Edwin H. Hartshorn.)

Q. Oh, I see. Now, you are familar with the map. This is west, Monterey is here and Del Monte, this is Fremont Extension, this is Park Avenue. What is the name of this street again?

Mr. Scholz: Augussita Road.

Q. Augussita Road, you are familiar with Augussita Road also? A. Yes, sir.

Q. Now, bearing in mind that the scale of this map is one inch to twenty feet—every inch upon this map represents twenty feet, twenty feet distance—can you point out to us where it was, if you can, on this particular map that Mr. Penders car was driven out into the inside lane going east?

A. Well, I would say on the average just looking at the map here, right, he cut over, let's see, this is the outside lane, right over here is, he cut into this lane here.

Q. Cut into this lane. And by "this lane," you mean the inside lane?

A. Inside lane going east.

Q. Going east, traveling east? A. Yes, sir.

Q. And where did you mark that?

A. Right about——

Q. We will just put a—and that will be H-1 which indicates the position of Mr., no, which indicates the place where Mr. Penders drove his car from the outside lane to the inside lane on the eastbound traffic side of the highway?

A. That's right.

Q. Is that correct? A. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. All right. Now, as Mr. Penders drove his automobile from the outside lane to the inside lane, did you observe him put his hand out or make any other signals? A. Yes, sir, I did.

Q. And about the same time can you tell us about when he put his hand out?

A. He put his hand out right after he cut out into the other lane, to pass over the double line.

Q. And he continued to keep his hand out how long, as you remember?

A. He continued right up until he made the turn.

Q. Until he made the turn? A. Yes, sir.

Q. All right. Now, we have him at point H-1 cutting into the inside lane of the eastbound traffic side of the highway. Now will you trace his course for us with that pencil and show where he made the turn into Park Avenue?

A. Well, he continued right on up the street, I would say.

Q. You are marking that on the inside——

A. I am marking that on the inside lane going east; yes, sir.

Q. Going east?

A. And I should say he continued right on up to about here and then he cut over. He made a left turn right here. [86]

The Court: H-2, is it?

Q. I see. H-2. H-2, right about here?

A. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. H-2 indicates the position of Mr. Penders car on the highway when he proceeded to make his turn to the left? A. That's right.

Q. And up to that time Mr. Penders at all times had his hand extended, is that correct?

A. That's right.

Q. Indicating his intention to turn. Now, at that time did you notice any automobiles approaching from the east on Fremont Street, Fremont Extension?

A. Coming in the opposite direction?

Q. Yes.

A. There was only one, sir. That was the Army vehicle.

Q. That was the Army vehicle?

A. Yes, sir.

Q. Now, can you indicate upon this map where it was that you first observed the approach of this Army vehicle from the east?

A. I should say——

The Court: You mean where was he or was the Army vehicle?

Mr. O'Donnell: Strike that out, Miss Reporter, and we'll start all over again. He saw this Army vehicle approaching.

Q. Where were you when you first observed the approach of this Army vehicle?

A. At that time I was just, well, just below this intersection right in here, between this newer intersection [87] that's in here now and this one.

Q. Will you mark on the map approximately to

(Testimony of Edwin H. Hartshorn.)

the best of your recollection where you were when you first observed the approaching Army vehicle?

A. I should say I was about 200 feet below this intersection.

Q. Two hundred feet below this intersection?

A. That's right. As close as——

Q. Well, I guess we wouldn't be able to get that on then because that would be a hundred feet, that would be way down here? A. Way down here.

Q. Well, we'll mark it down there. That will be H-3, indicating your position when you first observed the approaching Army vehicle. Where was it that you first observed the Army vehicle?

A. I, he was about, oh, a good 175 to 200 feet the other side of this pole on the corner here, on this inside lane.

Q. On the inside lane?

A. No, see, the outside lane coming westward would be the outside lane he was following on the outside lane.

Q. Outside lane? A. That's right.

Q. All right. Now, how many feet did you say?

A. I would say around 175, 200 feet.

Q. Of this pole here? A. That's right.

Q. Right about, his position where I have marked it there?

A. That's right. There's a Shell station right in here, service station. [88]

Q. There's a Shell station. You observed——

A. Service station. He was practically just opposite that Shell station.

(Testimony of Edwin H. Hartshorn.)

Q. That Shell station. So that will be marked H-4 indicating the position of the Army vehicle when you first observed it. A. That's right.

Q. Now, at that time did you have occasion to observe the rate of speed that Army vehicle was traveling?

A. No, sir, I couldn't tell you, coming facing me like that, I couldn't tell you just how fast he was going.

Q. Now, you continued all this time to be traveling easterly, is that correct? A. That's right.

Q. What was the next thing that attracted your attention to the Army vehicle?

A. Well, I noticed at the rate of speed he was going and——

Mr. Scholz: Well, just a minute. You testified just a minute ago that you couldn't tell the speed the Army vehicle was going.

The Witness: Well, I couldn't. I couldn't tell you just how fast he was going but I know he was going at, well, he was going right along, that way.

Q. You would say it was a rapid rate of speed?

A. Yes.

Q. But you wouldn't want to indicate the miles per hour? A. No, I couldn't do it.

Q. All right. Now, could you tell us what you observed after you saw the cars in their respective positions?

A. I saw [89] the way, the position that Mr. Penders was in, the way that he was going that

(Testimony of Edwin H. Hartshorn.)

either the Army vehicle was going to have to cut out around and miss him on the westward side of the inside lane or there was going to be an accident right there. I saw that much in a hurry.

Q. Did you observe the Army vehicle at the spot which we have marked H-4 before Mr. Penders started to make the turn at the point that you have indicated by H-2, if you remember?

A. Have to study this a minute. I saw, yes, he was, after he made the turn, I couldn't see, you couldn't see the vehicle, the Army vehicle until after he was over in here. That's when I noticed. He was across the white line when I could see the Army vehicle.

Q. As that Army vehicle approached Mr. Penders car, can you tell us the manner in which it was being operated? A. Mr. Penders' car?

Q. No, the Army car.

A. The Army vehicle.

Q. As it approached Mr. Penders' car?

A. Well, as it came up, the closer it got, I could see that he had noticed the vehicle in the street, the other vehicle. You could tell that he was applying the brakes because the Army vehicle was, you could tell that he was putting on brakes, not, because the Army vehicle——

Q. What indicated to you the driver of the Army vehicle was applying the brakes?

A. Well, I noticed that the car was, you [90] know how when you put on the brake all the way like that, it will try to go sideways.

(Testimony of Edwin H. Hartshorn.)

Q. It kind of swayed?

A. Swayed, that's it.

Q. Now, you witnessed the collision, did you?

A. Yes, sir.

Q. And will you tell us what parts of these two cars collided?

A. The front end of the Army vehicle hit the civilian car at, right just behind the column right behind the front bumper. That is where the point of impact was. That's where it first hit was there.

Q. Can you point out on this map the position of Mr. Penders' car at the time it was struck by the Army car? A. Mr. Penders' car?

Q. Yes, Mr. Penders' car, bearing in mind——

A. He came on around like this coming out of this street right here, I should say it was about, this is, this is where the car stopped.

Q. That's about Mr. Davenport's——

A. Well, I should say that it, that it was about 15 feet, 15 or 20, from the point of impact.

The Court: What was about 15 to——

The Witness: The, the civilian car. It went back down the hill, it went right sideways, when that Army truck hit it, it knocked it sideways.

Q. Knocked it sideways, did it?

A. Yes, sir.

Q. And approximately 15 feet, did you say?

A. Yes, sir.

Q. And when Mr. Penders' car came to rest, what was its position? [91]

A. It was up against the curb, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Up against the curb of the——

A. On the curb facing on the Fremont Extension where you come out on Park Street is about, you got the curb right here.

Q. Yes.

A. Well, his front wheel was up against here.

Q. Will you mark that now? All right. That's Penders' car about like this? A. That's right.

Q. That will be D-5.

The Court: H-5.

Mr. O'Donnell: Or H-5, rather. I beg your pardon.

Q. Now, you say that Mr. Penders' car was thrown about 15 feet? A. Yes, sir.

Q. Will you mark on there, if you will, approximately to the best of your recollection the point of impact, that is, where the two cars collided?

A. Let's see, this is—it's hard to tell.

Q. You understand my question?

A. Yes, sir. I'm just studying this map.

Q. Well, let me ask you this before you answer that question: Maybe I can help you out a wee bit. How far had Mr. Penders completed his turn, or how far had he proceeded over the north portion of Fremont Street when he was struck by the Government automobile?

A. He was in the outside lane, practically out of it, in fact.

Q. He was practically out of the outside lane?

(Testimony of Edwin H. Hartshorn.)

A. That's [92] right.

Q. And by the "outside lane," you mean the outside lane on the north?

A. On, on, let's see, would be the westward.

Q. Of the westbound traffic?

A. That's right.

Q. And you say he was practically out of it?

A. Yes, sir.

Q. He was? A. He was.

Q. And the Army vehicle struck him on the right side, just about the cowl, is that correct?

A. Yes, sir.

Q. All right, now. Will you mark the position, if you will, of Mr. Penders' car at the time of the impact?

A. Came up around here, I would say, right in about here.

Q. Relieve you——

A. Figure that out on the map.

Q. Yes, and that will be H-6. Thank you.

The Court: Six.

Q. Which indicates the position of Mr. Penders' car at the time of the impact.

The Court: I think we will take a recess for five minutes.

Mr. O'Donnell: All right, Your Honor.

(Recess, 2:42 to 2:48 p.m.)

Mr. O'Donnell: All right, you can take the stand again.

Q. Now, from your point of observation, could

(Testimony of Edwin H. Hartshorn.)

you tell approximately how fast Mr. Penders' car was traveling up—— A. Well——

Q. ——to the time of the impact? [93]

Mr. Scholz: Object to that on the ground that he has already been asked and answered, and he said he didn't.

The Court: No, he referred to the Army vehicle.

Mr. Scholz: Oh. I withdraw the objection.

The Court: That question has never been asked before.

A. I would say Mr. Penders' car was traveling at approximately 10 to 15 miles an hour.

Q. Now, after the impact what, if anything, did you do?

A. After the impact, I stopped the bus as soon as I seen what was happening, I slowed down, stopped the bus. I had such a load that the rest of my passengers couldn't see so I stopped the bus and told everybody to remain in the bus until I got back. I took the fire extinguisher with me and went over to the cars and it was smoking. Where they hit, where the cars hit, it broke the gasoline line off and it was smoking and I thought it was going to catch afire so I extinguished it and I noticed that the one lady in the back seat, her head was laying on the running board and due to a cut in the side of her face, the blood was running in her mouth and her head was down and she was choking so I moved her head to the back seat and she stopped right off.

Q. Do you recall which woman that was?

(Testimony of Edwin H. Hartshorn.)

A. She had on a flowered dress. I don't just recall. She was the younger of the two.

Q. Were you there when the police arrived?

A. No, I wasn't. I called the Police Department and—— [94]

Q. And you went on your way, did you?

A. I called the Police Department and they told me to go along and they were waiting for me when I got back to the depot.

Q. Now, I show you here Plaintiff's Exhibit No. 20 and ask you whether that is a fair representation of the position and condition of the cars involved in this accident when you first observed them, immediately after the impact? A. Yes, sir, it is.

Q. And can you identify this object that appears at the righthand corner, lower corner, of the photograph?

A. Yes, sir, that is the seat out of the Army vehicle.

Q. Seat out of the Army vehicle?

A. Yes, sir.

Q. And calling your attention to Plaintiff's Exhibit No. 19 and calling your attention particularly to what apparently appears to be an automobile seat in the lower lefthand corner, I'll ask you if you can identify that?

A. Yes, sir, that is the other half of the seat of the Army vehicle, I would say.

Q. The other half of the Army vehicle's seat?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. You have continued to live down there in that vicinity, is that correct?

A. Yes, sir, I have lived there all the time.

Q. And has the contour—got any more—have I got all those——

The Clerk: All the pictures, I believe. Oh, I'm sorry. Here are two more.

Q. Since May 11, has the condition——

The Court: 1946. [95]

Q. ——of the roadway, that is, Fremont Extension in the vicinity of Park Avenue, is it in the same condition today as it was at the time of the happening of this accident on May 11, 1946?

A. Exactly the same, sir.

Q. Exactly the same? A. Yes, sir.

Q. The road hasn't been——

A. Hasn't been——

Q. ——improved by widening or anything else?

A. No, sir.

Q. I show you here Plaintiff's Exhibit 22 and 21 and ask you whether that is a correct representation of the road, Fremont Extension in that vicinity at the time of the accident?

A. Yes, sir. This is the, looking eastward.

Q. Yes, sir, and are you looking at 21?

A. This is looking westward.

Q. I see. Fine. I will show you a photograph and ask you whether or not you can identify that?

A. Yes, sir. I took it myself.

Q. And when was that photograph taken?

A. That photograph was taken, I can—may I

(Testimony of Edwin H. Hartshorn.)

look at my paper here, sir? I have negatives in my pocket.

Q. Let the Judge see the photograph while you are——

A. It doesn't have it on here, but it was——

Q. Approximately?

A. I'll tell you exactly what day it was. I got them, I got them yesterday and it was the day before yesterday. This is Thursday. It was Tuesday.

Q. Last Tuesday? A. Tuesday afternoon.

Q. That would be the 12th?

A. Tuesday afternoon they were taken. I have the negatives right here.

Q. I see. And will you tell us what this photograph portrays? A. This photograph——

The Court: This is looking west?

Mr. O'Donnell: This is looking west, yes, sir.

Q. This is looking west? A. Yes, sir.

Q. That is, looking west on Fremont Extension?

A. Yes, sir.

Mr. O'Donnell: I showed those to you, did I not? Yes.

Mr. Scholz: Yes.

Q. How far west of Park Avenue were you standing when this photograph was taken?

A. As near as I could figure it out, I paced it off at 100 feet; in other words, I figured two paces to the foot.

Q. About 200 paces? A. 200 paces.

Mr. O'Donnell: I would like to introduce this into evidence for the purpose of the record.

(Testimony of Edwin H. Hartshorn.)

The Clerk: Plaintiff's Exhibit 23 in evidence.

Q. Referring to Plaintiff's Exhibit No. 23, there is on the right hand side of this photograph the picture of a portion, the front portion of a machine coming out from a side street, is that correct?

A. That, that vehicle sitting there is a 1929 Dodge.

Q. Is that your car?

A. No, it's a friend of mine. It was placed at, as near as possible to the accident, where the [97] accident was sitting.

Q. I see, and the position of that car as indicated in this photograph is approximately where the accident occurred in your opinion?

A. That's right.

Q. I see. A. As near as I could figure.

Q. In other words, that was the position of Mr. Penders' automobile? A. In——

Q. On Fremont Extension at the time of the actual impact, is that correct?

A. Yes, sir. Only his car, automobile would be turned in the opposite way.

Q. Opposite way. I see. A. Yes, sir.

The Court: Let me see that (to Clerk.).

Q. Now, as you drove east on Fremont Avenue at this particular time, other than Mr. Penders' car, were there any other cars traveling in the same direction? A. No, sir.

Q. There were not? A. No, sir.

Q. And other than the Army vehicle, were there

(Testimony of Edwin H. Hartshorn.)

any cars on the highway traveling in the opposite direction at that immediate time?

A. No, sir, I didn't see a one.

Q. So at the time of the accident, the south side of Fremont Avenue was clear of traffic, is that correct? A. Yes, sir.

Q. What was the condition of the weather on that particular day, Mr. Hartshorn?

A. It was clear, as I remember, sir.

Q. And the accident, from the testimony here, happened about 6:40 or 6:30; was it light at that time? A. Yes, sir. [98]

Q. You didn't have the lights of your car burning or anything? A. No, sir.

Mr. O'Donnell: I think you may take the witness.

Cross-Examination

By Mr. Scholz:

Q. Mr. Hartshorn, what was your purpose in taking the photograph indicating the Plaintiff's Exhibit No. 23?

A. I took the photograph on my own accord. Nobody, I just out of curiosity's sake, I just wanted to see how far you could see down that street.

Q. Now, isn't it a fact that you discussed this matter with Mr. Penders several times before this case came up for trial?

A. No, I—Mr. Penders was down to see me one time, that's all. Mr. Penders, no, I never discussed it with Mr. Penders at all.

(Testimony of Edwin H. Hartshorn.)

Q. You discussed it——

A. Mr. O'Donnell? Is that not your name? You came down one time.

Mr. O'Donnell: Yes, sir.

Q. You have a perfect right, but simply out of curiosity you went out and took this photograph?

A. I did myself; yes, sir.

Q. For the purpose of being able to testify here today? A. That's right.

Q. And you knew that you were going to be called by the plaintiff as a witness in this case?

A. Yes, sir.

Q. I show you herewith a copy of an affidavit certified as a true copy, purporting to have been signed by you on May 13, 1946, and you recall I think that I showed it to you? A. Yes, sir.

Q. ——and you stated that it was a true statement? A. That's right.

Mr. Scholz: Now, if Your Honor please, I offer this in evidence for the grounds of impeachment as Defendant's Exhibit next in order. I think it's C.

The Court: C.

The Clerk: Defendant's Exhibit C in evidence.

Mr. O'Donnell: Did you show that to Mr. Hartshorn during recess?

Mr. Scholz: Yes. Do you want to see it again? Better show it to him again, and will you read that to be sure that that's——

The Witness: Yes.

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: ——a true statement?

Q. And that was made two days after the accident? A. I believe it was.

Q. Do you recall what date the accident happened? A. It was May 11th.

Q. 1946? A. That's right, sir.

Q. And this was made on May the 13th, 1946. Now, at that time you stated that the sedan which was operated by, you testified operated by Mr. Penders was about a hundred feet west of Park Avenue when he made a signal for a left turn and at the same time slanted diagonally into the middle lane of the opposite half of the highway, is that correct? A. That's right, sir. [100]

Q. This intersection here is a little broad at the mouth of it, that is, Park Avenue is a rather broad intersection—I think we stipulated about 90 feet, is that correct? A. Yes.

Q. Now, will you come down here and indicate—(witness steps down)—may I have your ruler, Gene? There is 20 feet. One inch equals 20 feet. You understand that, don't you? A. Yes.

Q. Now, from this here, indicate a hundred feet west of the intersection where he made the turn into the middle lane of the opposite path.

A. This impact here, sir?

Q. No, a hundred feet west of Park Avenue.

A. You want to indicate it from here?

Q. No, this is west. You understand this is east?

A. That's right. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. And here is the mouth. A hundred feet west, now. Will you make a mark there?

A. O.k. 20 feet.

Q. A hundred feet would be five inches.

A. That's right, would be five inches.

Q. Well, don't make it diagonally.

Mr. O'Donnell: You better make it straight.

Q. You stated a hundred feet back?

A. That's right, sir.

Q. Well, now, you are making it diagonally. Let's make it this way.

A. O.k. Right here. This is——

Q. All right. Now will you indicate on this diagram the point where Mr. Penders turned and went over the double line?

A. Where he turned—— [101]

Q. Where he turned to go, turned and slanted into the west lane or—the west lane, yes—the lane for vehicles going west.

A. That's right. I should say it was around there.

Q. Well, now, indicating there, you have got your mark there. Don't slant it now. Make it right here. A. All right.

Q. Now make a mark there where you stated in your statement. A. All right.

Mr. O'Donnell: Wait a minute. He wasn't over there.

Mr. Scholz: No, that's—straight across there and mark it where it was. Now we will make this mark, call that D-1, Your Honor.

(Testimony of Edwin H. Hartshorn.)

The Court: That's it. Why don't you call it H-7?

Mr. Scholz: H-7.

Q. Now, H-7, Mr. Hartshorn, is where Mr. Penders crossed the double line and got into the westbound traffic lanes, is that correct?

A. That's right, about a hundred feet below.

Q. About a hundred feet below. Now will you take the stand, take your seat, Mr. Hartshorn? (Witness resumes seat.) Mr. Hartshorn, you never saw me before today, did you? A. No, sir.

Q. And the first time you saw me was in the courtroom this morning? A. Yes, sir.

Q. And I asked you to come up to the office of the United States Attorney? A. Yes, sir.

Q. And I stated to you all we wanted was the truth, nothing but the truth?

A. That's right, sir. [102]

Q. And I said we were not interested, the United States was not interested in winning the case or losing the case? A. Yes, sir.

Q. Just interested in presenting the facts to the Court? A. Yes, sir.

Q. Now, you recall I showed you a diagram? Do you recall my showing you this diagram?

A. Yes, sir.

Q. And I show you here a diagram marked 1 and 2? A. Yes.

Q. Purporting to be, I assume, automobiles?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. And ask you if that was your recollection of where the accident occurred and you stated "yes"?

A. Yes, sir.

Mr. Scholz: I will offer this in evidence, if Your Honor please, as Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit D in evidence.

Q. And do you recall I asked you if those vehicles were moved by the impact and you stated to me it was eight or ten feet?

A. That's right. Eight or ten or fifteen, I didn't know for sure, that's my——

Q. No, you didn't know for sure but you stated eight to ten? A. Eight to ten.

Q. And not fifteen feet, as you testified here?

A. Well, I thought it was ten or fifteen, I wasn't sure.

Q. Well, what did you state to me?

A. Eight or ten.

Q. Now, on direct examination, Mr. Hartshorn, you stated that the Penders automobile—what kind of automobile was he driving?

A. I believe it was a Hupmobile, sir. [103]

Q. 1934 Hupmobile?

A. That's right, I don't know the year.

Q. Hupmobile?

A. It was a Hupmobile, that I know. It was a Hupmobile.

Q. And what kind of vehicle was that Army vehicle?

A. I do believe they call it in the Army a carry-all.

(Testimony of Edwin H. Hartshorn.)

Q. And how many passengers does that carry?

A. I should say between eight and ten.

Q. Are you familiar with that type of an automobile?

A. Well, as near as I can figure now, I don't recall now, some of them carry less, some carry more. I never counted the passengers in a vehicle but that is what I would say they carry, eight or ten.

Q. And that vehicle is noted for being top-heavy, is it not? A. Yes, it is.

The Court: What is that last question?

Mr. Scholz: And it is noted for being top-heavy.

Q. Now, on direct examination you testified that you first saw what you afterwards found out to be the Penders car, it was ahead of you on the outside lane going east, is that correct?

A. Yes, sir.

Q. And that was back how many feet from the intersection of——

The Court: What's the name of the street that comes in there?

Mr. Scholz: Augussita. Should I insert it in there, Your Honor? Would that be agreeable to you?

Mr. O'Donnell: Sure, go ahead, never spell it (laughing). [104]

The Court: Can you pronounce it?

Mr. Scholz: Augussita.

The Court: What?

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: Augussita. A-u-g-u-s-s-i-t-a.

Q. How many feet east of Augussita was your car and the Penders car when you first saw the Penders car?

A. I should say about 400 feet.

Q. About 400 feet, and you were both, the Penders car was ahead of you——

A. That is correct.

Q. Is that correct? A. That's right.

Q. Did he cut in ahead of you?

A. No, sir.

Q. How did he cut in?

A. He was ahead of me. I caught up with him.

Q. Oh, I see. And in that car there were four elderly persons? A. Yes, sir.

Q. And in the front seat was Mr. Penders?

A. Well, I didn't know at the time. There was a man driving at the time. I couldn't tell whether it was a man and woman in the front seat or what they were until after the accident occurred.

Q. I see.

A. But I knew there was a man driving.

Q. And then you proceeded east on Fremont Extension or Fremont Street as designated here—did you pass the Penders car?

A. No, sir; I never passed it at all until the accident.

Q. You kept behind the Penders car?

A. Yes, sir.

Q. And when it reached Augussita Road, you were still behind it? [105] A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Approximately how many feet?

A. Well, I kept slowing up all the time. I should say by the time it happened, I was——

Q. No. Now listen to my question.

The Court: He started to answer. He was going to say, I would say at the time it happened.

Mr. Scholz: I mean he——

The Court: Don't write this, Miss——

Mr. Scholz: Will you read the question? (Question read.)

Mr. O'Donnell: I think you better reframe your question.

Mr. Scholz: I'll reframe it, yes.

Q. As the Penders car reached the intersection of Augussita Road and Fremont Road, your car was still behind the Penders car?

A. Yes, sir.

Q. About how far back?

A. I should say approximately 150 feet.

Q. 150 feet? A. Yes.

Q. Then at the point indicated here by H-7, the Penders car slanted over the double white line to the north side of the road? A. Yes, sir.

Q. And at that time how far back were you?

A. Well, I couldn't tell, I should say, no, that wouldn't, it wasn't the same distance, it's hard to measure it on that map, it doesn't [106] look right on that map.

Q. Without looking at the map, approximately how far would you say it was?

(Testimony of Edwin H. Hartshorn.)

A. I would say about a hundred feet.

Q. A hundred feet back and when he slanted across the double white line to the north side of the road, did you at that time see the Army vehicle?

A. Oh, yes. After he had crossed, after he had crossed the double white line, did you say?

Q. After he slanted in, after he got over the white line, where you've got H-7, did you see the Army vehicle?

A. No, not at the time, no, I didn't, not at the time he crossed over. No, I didn't.

Q. Now, he proceeded in a slanting direction towards Park Avenue, did he not?

A. Yes, he did, sir.

Q. Now, would it be fair to indicate that he proceeded in a direction as indicated by this pencil?

A. Well, no, it doesn't look like that to me, he was farther up, to me, it looks like he was farther up towards the intersection before he crossed the double white line.

Q. Did you notice the pole up here?

A. A light pole; yes, sir, along the bank.

Q. That is approximately 80 or 90 feet from the intersection of Park Avenue and Fremont, is it not?

A. I should say so. There is one on top of the hill at Park Avenue.

Q. No, I am talking about this one here right now.

A. Yes, sir, I know where it is. On the other side of the intersection. [107]

(Testimony of Edwin H. Hartshorn.)

Q. Yes. And what do you mean by the other side of the intersection?

A. There is one over on the corner where those buildings, and then there is another one on the other side of the intersection, the same side of the street.

Q. I agree with you, Mr. Hartshorn, but I am talking about this pole now. A. That's right.

Q. Which is just almost directly on a prolongation of the east lane of Augussita Road?

A. That's right.

Q. To the edge of the sidewalk there?

A. That's right.

Q. And from about that. Now, you remember that pole? A. I remember that pole, sir.

Q. Now, he started across, slanting toward the north side of the road before he reached that pole, did he not?

A. I should say just about where that pole was as near as I can figure.

Q. Then your H-7 indicates the true position, does it not?

A. I think it does as far as that's——

Q. Now, he proceeded towards—at a slant towards Park Avenue, did he not?

A. Yes, he did.

Q. And would this be a fair interpretation of how he proceeded to drive before the impact according to my pencil I am holding there now?

A. Yes, he made, he made more of a round,

(Testimony of Edwin H. Hartshorn.)

round turn. It was a, it wasn't straight across, no. You couldn't say that.

Q. All right, then. Let's take it step by step. He was slanting when he crossed H-7, when he hit H-7, is that right? [108]

A. That's right. That's right.

Q. Now, did he go along on the inner lane on the north side any distance straight?

A. No, not at all, sir, not hardly at all. He just, right, right across.

Q. He just slanted right across?

A. That's right.

Q. Now, from H-7 how far had he traveled by the time he had reached the outer lane of the north part of Fremont Street?

A. He was practically up into the intersection right then.

Q. Well, now, will you indicate where in the intersection he was with your pencil, this pencil here? A. By the time I saw the vehicle?

Q. No, I am talking about where in the intersection he was. A. Or at the time——

Mr. Scholz: Will you read that question, Miss Reporter?

(Question read.)

Q. Now, this is the outer lane. This is the outer lane, isn't it, now? How far from H-7 had he traveled when he had traveled—how many feet had he traveled when he reached the outer lane, the north lane of Fremont Street, this lane right here?

(Testimony of Edwin H. Hartshorn.)

You see, this is the outer north lane right here. Just tell me how many feet without looking at the map.

A. Oh, about 30 feet, I guess, 30 or 35 feet.

Q. Thirty or 35 feet, all right. Now, 30 or 35 feet from H-7 would be about there, is that correct?

A. That's right.

Q. All right. Then he had reached here, he had traveled there [109] when he reached the outer lane, is that correct? The outer north lane. A. Yes.

Q. All right. We will make that H-8, indicating approximately the place he had reached on the north lane of Fremont Street. Will you take the chair again, please? (Witness resumes seat.) Now, you have already stated that when Mr. Penders' vehicle was at H-7, you did not see the Army vehicle? A. That's right, sir.

Q. Now, when Mr. Penders' vehicle was at H-8, did you see the Army vehicle?

A. Yes, sir, just right after he had crossed the first white line, I mean, the double white line into the outer lane.

Q. And that, he just crossed H-8, that is when he crossed into the outer lane?

A. That's right.

Q. And when he had reached that spot, then you saw the Army vehicle? A. That's right, sir.

Q. Now, tell me how many feet east of the intersection of Park Avenue and Fremont Street was this Army vehicle when you saw it?

(Testimony of Edwin H. Hartshorn.)

A. When I first saw it, it was, oh, I can't quite recall. It's, it was at the Shell station, that's where I first saw him, where I saw the Army vehicle from where I sat. Now, how many feet that is, I can't say. It's a good 200, 250, if not more.

Q. You say, now, what do you say, 200 or 250 or more, which is it?

Mr. O'Donnell: Not more, he says. [110]

Mr. Scholz: Or not more. I am asking him what he said. I don't know.

The Court: That is the same distance to which he testified on direct examination. I think 175 feet.

Mr. Scholz: Yes, he testified on direct examination 175 to 200 feet, that is correct, yes.

The Court: But he also said in front of the Shell station.

Mr. Scholz: That's correct.

Q. Now, you measured that distance, 175, 200 feet, from where? Where did you start to measure that? The mouth of this is approximately 90 feet.

A. You mean when I took the photograph, sir?

Q. No. A. Where, sir, saw the vehicle?

The Court: He wants to know 175 or 200 feet starting from where.

A. (Continuing): Starting from where. I was figuring from the intersection as you asked me the question. From the upper edge of the intersection.

Q. Whereabouts in the intersection?

A. I was figuring from the upper edge of the intersection right from the pole, we will go from the upper pole right by the building, that's right.

(Testimony of Edwin H. Hartshorn.)

Q. There's a pole on the northeast corner of the intersection, is that correct?

A. That's right, sir.

Q. And you figured that the Army vehicle was 175 to 200 feet [111] east—— A. East.

Q. ——of that pole when you first saw it?

A. That's right, sir.

Q. Now, Mr. Hartshorn, you traveled that daily, did you not? A. Yes, sir, seven trips a day.

Q. And you are very familiar with that road?

A. I am, sir.

Q. Now, isn't it a fact that this road, Fremont Street, up to the intersection of Park Avenue, up to the east line of Park Avenue, extension of the east line of Park Avenue is uphill?

A. Yes, sir, it's a little incline but I can still see over it.

Q. It is a fact that it is about 20 or 30 degrees?

A. I don't think it's that much.

Q. Well, what is the percentage grade there? Do you know what I mean by percentage grade?

A. Yes.

Q. 4% grade, 10%. 10% grade would be——

A. I would say not quite 10%.

Q. You say only 10%?

The Court: He said not quite 10%.

Q. Not quite 10%. And then that still continues uphill a little ways on the east side, I mean prolongation of the east side of Park Avenue, does it not? The uphillness or grade still continues

(Testimony of Edwin H. Hartshorn.)

east of the prolongation of the east side of Park Avenue, does it not?

A. I would say, sir, that it ends just about at that intersection right there at the top. That's the top of the hill. Right in the course of the turn. [112]

Q. You mean where the pole is?

A. That's right, sir, right directly across the street.

Q. And you state now it doesn't still go further—— A. Back.

Q. Go further east? A. No, sir, it doesn't.

The Court: Mr. Scholz, I think I will have to take an adjournment now because I have to be in Oakland.

Mr. Scholz: Oh, yes, I forgot.

The Court: Ten o'clock tomorrow.

Mr. O'Donnell: What are we going to do about tomorrow?

The Court: Afternoon we will adjourn. How long do you expect this case will take?

Mr. Scholz: If Your Honor please, this case has been set for trial numerous times—I think September 17, November 17, November 29, January 6—I have a witness coming from Portland, Oregon, and as soon as I found out from your Clerk that we were definitely set, I wired him. Now, I will have to——

The Court: Well, we can cross that bridge——

Mr. O'Donnell: Oh, yes. We will be finished tomorrow.

The Court: By noon then tomorrow.

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: I hope so.

The Court: Because otherwise I want to adjourn at noontime because it is Good Friday.

(Adjourned at 3:25 p.m. to following day.)

Friday Morning Session
April 15, 1949, 10:00 o'Clock

The Clerk: Penders v. The United States, for further trial.

Mr. Scholz: That is ready for the Government. I believe that Mr. Hartshorn was on the stand.

EDWIN HARTSHORN
resumed the stand.

Cross-Examination

By Mr. Scholz:

Q. Mr. Hartshorn, I believe you stated that you were driving a bus on Fremont Street there daily for some time prior to the accident.

A. That is right, sir.

Q. And also some time after the accident, is that correct? A. Yes, sir.

Q. Do you know what the speed limit was at the time of the accident on Fremont Street?

A. Thirty-five miles per hour at that particular place.

Q. Thirty-five miles per hour?

A. That is right.

Q. You are sure of that? A. Yes, sir.

Q. Now, at the time of the impact and imme-

(Testimony of Edwin H. Hartshorn.)

diately after the impact the government vehicle driver remained in the car?

A. Yes, sir, both of them did.

Q. Then your statement the other day that the—part of the seat was there, wasn't any implication it was thrown out by the impact, is that correct?

A. I didn't catch that one.

Mr. Scholz: Would you read the question?

Mr. O'Donnell: Do you understand that question?

The Witness: Not quite.

Mr. Scholz: I will reframe the question.

Q. It was your testimony the other day, or there was in my mind an implication that part of the driver's seat of the government vehicle was thrown out by the impact. That is not true, is it?

A. No, sir.

The Court: What do you mean, that the implication is not true?

Mr. Scholz: Pardon me.

Q. You mean that the government seat wasn't thrown out by the impact of the two vehicles?

A. Yes, it was, sir, the seat was thrown out. I didn't understand your question.

Q. Didn't you just state just a few minutes ago prior to this question that the government driver remained in the government vehicle at the time of the impact and immediately thereafter?

A. Yes, sir.

Q. Was that the seat that the driver was seated upon?

(Testimony of Edwin H. Hartshorn.)

A. That I couldn't tell you, sir. I didn't pay much attention to the government vehicle. I noticed that the men in the [115] government vehicle—the man in the vehicle wasn't hurt as bad as the other car. I paid more attention to them.

Q. Now, this road at the intersection of Park Avenue and Fremont Street curves to the north, does it not? A. Going west?

Q. Going west, that is correct.

A. Yes, sir.

Q. Would you indicate to the extent, in your opinion,—Strike that out. Do you know what, how many degrees it curves to the north?

A. No, I don't, sir.

Q. Approximately?

A. No, sir, I don't. It is slight, it is a very slight curve.

Q. You indicated in your testimony yesterday that when you were 100 feet west of H-7 you saw the government vehicle approximately 175 to 200 feet east of the westerly extension of the curb line of Park Avenue, is that correct?

A. That is right, sir.

Q. Now, as a matter of fact, in the vehicle you described that you were driving at that time, it would be impossible to see a vehicle such as the government vehicle, which you saw, at that distance.

A. You can see it, sir.

Q. Now, you stated that the—that the government vehicle—I mean,—Strike that. You stated

(Testimony of Edwin H. Hartshorn.)

that Mr. Penders' vehicle [116] crossed the white line, commenced to cross the white line at H-7.

A. There is one subject I would like to bring up on that there.

Q. Just answer my question. A. Yes, sir.

The Court: Let him explain. He said he wanted to explain something.

A. When we measured that yesterday, I was measuring—when you speak about that, I would like to bring it out if I may. When I was figuring from that, measuring from that, I am figuring from the intersection as to where the collision happened.

The Court: I don't understand that.

The Witness: Well, sir, I would like——

Mr. O'Donnell: Can you show on the map what you meant?

Mr. Scholz: Just a minute. I suggest you take that on cross-examination.

Mr. O'Donnell: The Court asked the question.

The Court: I just said I didn't understand the witness' last statement.

Mr. O'Donnell: Would Your Honor want him to demonstrate at this time?

The Court: Read it back to me.

(Answer read.)

The Court: I don't understand that. [117]

Q. (By Mr. Scholz): Let me ask you a few questions. In your statement, in your affidavit which has been offered in evidence here, you stated that "A sedan was traveling the same direction as I when about 100 feet west of Park Avenue the driver

(Testimony of Edwin H. Hartshorn.)

signalled for a left turn and at the same time slanted diagonally into the middle lane on the opposite side of the highway." Is that correct?

A. That is right, sir.

Q. Now, then, it was 100 feet west of Park Avenue, is that correct?

A. That is right, sir. I am figuring from the intersection.

Q. At the time that he slanted to the wrong side of the highway? A. That is right, sir.

Q. Now, when the Penders automobile slanted to the wrong side of the highway, it went into the lane on the wrong side nearest to the double line, is that correct? A. That is right.

Q. And it continued slanting towards the outer lane on the wrong side, that is, the north side of the highway?

A. That is right, right into the intersection of Park Avenue.

Q. And therefore it would be slanting in this direction, is that correct (indicating with my pencil)?

A. No, sir, that is what I was trying to bring out, the point there—— [118]

Q. (Interrupting): The answer is no, it wouldn't be slanting in that direction? A. No.

Q. Would it be slanting in this direction?

A. Yes, sir.

Mr. O'Donnell: I submit, may it please the Court, that the witness should be allowed to show on

(Testimony of Edwin H. Hartshorn.)

the map himself what direction he was referring to rather than have Mr. Scholz show it.

Mr. Scholz: I think he is an adverse witness. Incidentally, the Government did subpoena him, but you produced him as a witness and I think that this is cross-examination and on cross-examination we are allowed a wide latitude if I am not mistaken.

The Court: That is correct, but the witness on the other hand is desirous of explaining what he meant by yesterday's testimony. As I understand him to say, he places that 100 feet in from the—from where it was placed on the map, but from closer in, measuring from the middle of the intersection of Park Avenue, is that correct?

A. That is right; that is where I was figuring from.

The Court: Where is it measured from on the map?

Mr. O'Donnell: From the curb line.

Mr. Scholz: It was measured from the curb line.

Mr. O'Donnell: The west curb line of Park Avenue. [119]

Mr. Scholz: That is correct.

The Court: In other words, that would bring it up closer to Park Avenue.

Mr. O'Donnell: That is correct.

Mr. Scholz: That would bring it—have you got a ruler?

Mr. O'Donnell: The Clerk has a ruler.

(Testimony of Edwin H. Hartshorn.)

Q. (By Mr. Scholz): In view of your statements just now, Mr. Hartshorn, would you step down to this diagram and indicate on this diagram the position you now place the car?

A. Yes, sir. Figuring yesterday, sir, I was figuring from the accident—where the accident happened, and I was figuring—I mean, this is where—I am figuring from the center of the intersection as to where Mr. Penders was hit.

Q. Now, please, listen to me carefully and place on this diagram by a dot the position of the Penders car when he first crossed the double white line.

A. I should figure about 100 feet which would be from here, I would say,——

Mr. O'Donnell: A little louder. Just a minute before you answer that. I think it should be marked —never mind. Do it so it will be marked bearing in mind that the scale is one inch for every 20 feet and your distance is 100 feet from the intersection.

Mr. Scholz: Just a minute. Is there any objection to the question? [120]

Mr. O'Donnell: I just want the witness to be straightened out here in his testimony.

Mr. Scholz: So do I. That is exactly my purpose, to straighten him out.

Mr. O'Donnell: I want him to use the ruler and make his mark.

Mr. Scholz: He understands it.

Q. You looked at this diagram yesterday, didn't you? A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. ——before court you looked at it this morning? A. Yes.

Q. And you discussed the matter this morning?

A. Yes.

Q. With Mr. Penders?

A. Yes, sir. I figured from the intersection as to where—here is your place.

Mr. O'Donnell: Just a minute. That doesn't mean anything, Mr. Hartshorn. Will you start that over again so that we can——

Mr. Scholz: Let's let him testify and we will straighten him out. If I can't straighten him out, you can.

Mr. O'Donnell: I beg your pardon.

The Witness: I would figure where he started to cross over was right in here.

Mr. O'Donnell: Will you mark that?

Mr. Scholz: Make a little dot, will you, Mr. Hartshorn? [121]

Mr. O'Donnell: Will you mark that H-9?

Mr. Scholz: All right, you may resume your stand in the chair.

Q. Now, at that time you stated yesterday that your vehicle was approximately 100 feet in the rear of Mr. Penders' car, did you not so state?

A. Yes, sir, in the outer lane.

Q. And at that time you told me also that your car was west of the intersection of, it looks like Esther Road and Fremont, is that correct?

A. That is right, sir.

(Testimony of Edwin H. Hartshorn.)

Q. ——approximately 100 feet, is that correct?

A. Well, it was close to that. Right around there somewhere. It was close to the intersection, we will say.

Q. Now, at the time that Mr. Penders' car slanted into the wrong side of the road and by that I mean the north side of the road, you first noticed the government vehicle?

A. When it first crossed the double white line?

Q. Will you read my question?

(Question read.)

Mr. O'Donnell: Is slanted a proper word? Is that correct?

The Witness: No, sir, he cut across the double white line into the intersection, fairly square into the outer lane.

Q. (By Mr. Scholz): Well, will you let me call your attention to your affidavit which was made on May 13, 1946. The third paragraph. At the [122] time—let's see, "the driver signalled for a left turn and at the same time slanted diagonally into the middle lane on the opposite side of the highway." Is that a correct statement?

A. That is right, sir.

Q. Then he did slant? A. He did.

Q. Now, Mr. Reporter, will you read my question again that has not yet been answered?

(Question read.)

A. Well, just as soon as he crossed into the outer lane.

(Testimony of Edwin H. Hartshorn.)

Q. At the time, at the time, I asked you. Will you answer that question? A. No.

Q. Let me call your attention to your affidavit. "At the time of signalling, the driver was in the middle lane of the right half of the road at this instant I noticed travelling toward Monterey an army vehicle." You made that statement?

A. Yes, sir.

Q. Is it a correct statement?

A. Yes, sir. He cut—as he cut into the intersection—as he started to cross into the outer line is when I noticed the car coming, the army vehicle.

Q. You also made the statement that the—this vehicle, referring to the army vehicle, in my opinion. To be traveling at approximately 35 or 40 miles per hour. May I have this [123] affidavit to show him, if Your Honor please?

"I noticed traveling toward Monterey an army vehicle. This vehicle, in my opinion, appeared to be traveling at approximtaely 35 to 40 miles per hour."

You made that statement? A. Yes, sir.

Q. Was it true?

A. Well, sir, to that I couldn't tell you. I will be——

Q. You mean to say you made a false statement under oath?

A. Sir, when that statement was written up, it was right after the accident.

Q. No, it wasn't right after the accident. I beg

(Testimony of Edwin H. Hartshorn.)

to correct you, it was written on the 13th day of May 1946 and subscribed the 13th of May.

A. Well, at the time it was written up, the officer that made the statement up—at the time it was written, he asked me the questions and then he wrote the statement up and I signed it.

Q. Did you read it over before you signed it?

A. I believe I did, sir.

Q. And that—the matter of this accident was freshly in your mind on the 13th day of May 1946 then, fresher than on the 15th day of April 1949, wasn't it? A. Yes, it was.

Q. Now, did you make this statement:

"Owing to the road contour, I knew that the operator of the [124] army vehicle could not possibly have seen the hand signal given by the civilian nor could he have until he topped the rise and seen the civilian vehicle proceeding towards him."

A. That is right, sir. He couldn't. He could see the vehicle but he couldn't see his hand signal.

Q. He couldn't see his hand. You also stated:

"Nor could he have until he topped the rise see a civilian vehicle proceeding towards him."

You made that statement?

A. I believe I did, sir.

Q. It is true?

A. Well, I would say it is but you can see the vehicle, though, there is no getting around it.

Q. Well, now, will you——

Mr. O'Donnell: That is what he said.

(Testimony of Edwin H. Hartshorn.)

Q. (By Mr. Scholz): You just stated there that you made the statement that due to the contour of the road the army vehicle driver could not see the civilian vehicle until he topped the rise and you said that was a true statement.

A. That is right, sir, the way——

Q. (Interrupting): Now, is that correct?

A. Taking it from the way I saw the vehicle and the way the driver was going, I knew he couldn't see the man, see the other car. Whether they were talking in the car I couldn't tell you.

Q. When you say they were talking in the car—— [125]

A. ——whether the men were talking in the army vehicle or not, I couldn't tell you. I couldn't see the car until I got right on it because the way the car was going you could tell he didn't see the vehicle.

Q. He couldn't see it?

A. You could see it if you was on the highway. Now, if you was coming in there in the bus, riding on the seat you could see it, yes.

Q. Is this statement that you made on the 13th, this sworn statement you made on the 13th day of May 1946 true in this respect:

"That due to the road contour——"

Mr. O'Donnell: Pardon me, Mr. Scholz. Have you got another copy of that so that you can let the witness follow you?

Mr. Scholz: Would you like to follow me, Your Honor, too, on this extra copy?

(Testimony of Edwin H. Hartshorn.)

Q. Now, again I call your attention to this statement:

"I noticed traveling towards Monterey an army vehicle. This vehicle, in my opinion, appeared to be traveling approximately 35 or 40 miles per hour. Owing to the road contour, I knew—I know that the—I know that the operator of the army vehicle could not possibly have seen the hand signal given by the civilian nor could he have until he topped the rise and see the civilian vehicle proceeding towards him." [126]

You made that statement, did you not?

A. Yes, sir.

Q. It is true, is it not? A. Yes.

Q. Now, the rise, the top of the rise is right here, is it not (indicating), generally that section of the road?

Mr. O'Donnell: I think the testimony is there is a pole there at the corner.

The Witness: That is what I would think.

Q. (By Mr. Scholz): Is that the top of the rise?

A. Yes.

Q. Indicating there on the diagram a place marked Pole and with a circle near it, near the eastern property line—the eastern curb line of Park Avenue and the northern curb line of Fremont Street. And now, that is the top of the rise, isn't it?

A. Yes, sir.

Q. In other words, then, due to the contour of the road until the army vehicle had reached this

(Testimony of Edwin H. Hartshorn.)

point marked and indicated here before and marked with the pole, he could not see that civilian car in the place where it was?

A. Well, he could see it, sir. I made the statement but he can still see it. I would say that he can still see the car.

The Court: Well, when you were back 100 feet behind the place where the civilian car started to turn into the north lane, [127] you could see, as I understand it, you could see the government car about 175 to 200 feet back?

A. Yes, sir, I could.

The Court: And you were sitting in the position where your eyes were about eight feet above the ground?

A. That is right, sir. I measured the bus, I measured the clearance of the bus, my vision clearance with a ruler. My manager and myself measured it in the shop.

The Court: If you could see him from that distance back, why wouldn't he see the car before he reached the top of the rise where the pole is?

A. Well, I was taking it from the way he was driving, sir, he didn't see the car. That is the way I meant the statement to mean that he didn't notice it, you could tell by the way the man was operating the vehicle that he didn't see the car in the intersection. When this statement was taken, it was taken in a hurry, it was made up in about three minutes.

(Testimony of Edwin H. Hartshorn.)

The Court: You didn't write that statement out yourself?

A. No, sir, I didn't write the statement out myself.

The Court: It was written out for you?

A. It was written out for me and I signed it.

Q. (By Mr. Scholz): You read it over before you signed it?

Mr. O'Donnell: He testified to that.

Q. (By Mr. Scholz): And it was correct, to the best of your ability at that time, that you signed it?

A. Yes, sir, the officer came in the house—came up to the door. In fact, he didn't even come in, he just came to the door and handed it to me and asked me if I would read it and sign it.

Q. Do you mean to say he typed it up——

A. (Interrupting): No, sir, he didn't type it up. He asked me the questions—he asked me the questions, he just took notes on it and he wrote it up. I was busy shaving at the time and getting ready to go to work. I had to go to work in the afternoon and he wrote it up. He sat in his army vehicle station car out in front of the house. I was staying in cabin 49 at the 17 Mile Drive Cottage Court. When he sat there in the vehicle and wrote it up,—down in his book then when he got done he handed it to me and I signed it. He came to the door and I signed it.

Q. But you read it over before you signed it?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. You were not interested in the case at that time at all?

A. I wasn't interested. It didn't concern me. I didn't feel it concerned me at all.

Q. But when you read it over, it was correct as far as you know? A. That is right, sir.

Q. Now, as the Penders car slanted across the double line into the north side of the highway, you stated you saw the government [129] vehicle?

A. Yes, sir.

Q. In what lane on the west bound traffic was it, was the government vehicle when you saw it?

A. When I saw it, he was on the outside lane.

Q. That would be the north lane?

A. The north lane going west.

Q. The north lane going west?

A. That is right, sir.

Q. Was he proceeding straight down within the two lines designating the north lane going west?

A. Yes, sir.

Q. Then what happened next to the government vehicle?

A. Well, as soon as he noticed the—as soon as he noticed the car when he topped the hill, he jammed on his brakes, the truck started to swerve, the back end of it did, back and forth.

Q. And did he attempt to swerve to the right to avoid Mr. Penders' car?

A. Well, the truck, I think, automatically went that way. The rear end went to the outer—the inner

(Testimony of Edwin H. Hartshorn.)

lane and the front wheels stayed towards Park Avenue going west.

Q. Now, you say the rear end went to the outer lane. I don't think you mean that, do you?

A. I mean the inner lane, excuse me.

Q. Did you notice him swerve to avoid Mr. Penders' car? [130]

A. I personally think it was the brakes that made the car go like it did.

Q. Will you answer my question, if you know? Will you read the question?

(Question read.)

The Witness: Well, he was so scared—yes, he did in a way.

Q. I call your attention to your affidavit: "The operator of the army vehicle applied his brakes and swerved toward his right attempting evidently to avoid the sedan but was unsuccessful."

That is a true statement?

A. That is right, sir.

Q. Now, at the time that you observed the government vehicle, Mr. Penders' car was in the inner lane going east?

A. Not the full vehicle, sir. It was partly in the outer lane and in the inner lane, too, when I noticed the vehicle.

Q. When you noticed the army vehicle Mr. Penders' car was partly in the inner lane and partly in the outer lane going east? A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Mr. Penders' car kept on pursuing the same direction that he was going, did he not?

A. Yes, sir.

Q. He did not stop or swerve back to the right or left?

A. Not until he saw—not until the vehicle started to—applied [131] his brakes. You could hear the squeal of the wheels.

Q. Where was the position of the government vehicle when you heard the squeal of the brakes? Will you indicate it on this diagram?

A. Yes, sir.

Q. Use your ruler so it will be in accurately.

A. It was, I should say,——

Q. (Interrupting): Before you make the spot there, you had better check it with your ruler.

A. I was just figuring from the poles here.

Q. One inch is 20 feet.

Mr. O'Donnell: Put up the ruler up there at the pole.

A. And figuring from where Mr. Penders' car——

Q. (By Mr. Scholz): Let me ask you this question: Was it, at the time you heard the squeaks, the government—was the government car east of the pole? A. Yes, sir.

Q. Approximately how many feet?

A. Oh, I should say he was approximately 75 feet.

Q. 75 feet? A. That is right.

(Testimony of Edwin H. Hartshorn.)

Q. Will you mark on the diagram, then, using your ruler so you get the scale, the position of the government vehicle when you heard the squeal of the brakes?

The Witness: It would be about an inch and a quarter. [132]

Mr. O'Donnell: No, it would be more than that.

The Witness: It would be an inch and three-quarters.

Mr. Scholz: No, one inch is 20 feet and you said 75 feet, didn't you? A. Yes.

Q. 20, 40, 60—that is three and a half inches.

A. That is right, three and a half inches, that is right.

Q. Now, wait a minute now before you mark the three and a half inches. Have you got that spot there now? A. Yes.

Q. Now, also indicate——

A. (Interrupting): You want it figured from the pole?

Q. I don't want to figure it any way. I wasn't there. I want you to testify to what you saw.

A. Well, what I want to figure from is while I was trying to get is a definite place where we are figuring from.

Q. You stated it was 75 feet east of the pole, is that correct? Approximately 75 feet east of the pole? A. That is right, approximately.

Q. And that would be three and a half inches, would it not? A. That is right.

(Testimony of Edwin H. Hartshorn.)

Q. Now, also indicate at the same time where the government vehicle was in respect to the lanes.

A. He was in this lane right here.

Q. Now, that is your stop there. Now, will you make your [133] spot there? Now, was he running along the outer edge of the lane at that time?

A. He was running on this lane like this (indicating).

Q. I mean, where you have got your spot marked there. A. He was running on this lane.

Q. Will you circle that and we will call that H——

The Court: H-9.

Mr. Scholz: H-10.

The Court: What is H-9?

Mr. Scholz: H-9, Your Honor, is——

The Court: Where Penders started to cross in the north lane.

Mr. Scholz: H-10, all right.

(The witness indicates.)

Q. (By Mr. Scholz): Now, at that time when you heard the squeak of the brakes which was designated as H-10, where was Mr. Penders' car?

A. He was right—pardon me, he was right in this intersection right here coming around.

Q. Will you indicate the spot on the diagram where his car was at the time you saw that?

A. Well, it was just about halfway across, right in here, right in the intersection.

Q. At H-11?

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: At the spot marked H-11? [134]

(The witness indicates.)

Q. (By Mr. Scholz): Will you take your chair again. Now, I think, Mr. Hartshorn, you testified that Mr. Penders crossed the white line in a slanting direction. A. Yes, he did, sir.

Q. And he continued to maintain that slanting direction until he was struck by the government vehicle?

A. Well, not right up to the—not right up to the impact. The minute he noticed him, he stepped on the gas and went over to this curb a little bit, trying—up into the intersection, trying to miss him is what he done.

Q. How do you know that Mr. Penders noticed the government vehicle?

Mr. O'Donnell: Just a minute. I move to strike that out as argumentative, may it please the Court.

Q. (By Mr. Scholz): Well, he said he knew.

Mr. O'Donnell: It is merely a conclusion.

Mr. Scholz: He said he knew Mr. Penders—knew, and I want to know what he knew.

The Court: I think that is a fair question.

A. I could tell exactly how he knew, sir, by the way the vehicle was on the side slant toward me. I was looking from——

Q. When you say "vehicle" you must remember you have got two vehicles. When you say "vehicle" which one do you mean?

(Testimony of Edwin H. Hartshorn.)

A. Mr. Penders' vehicle is the one we are talking about. [135]

Q. You knew Mr. Penders—you knew that Mr. Penders noticed the government vehicle because of the side slant?

A. No, sir, I was going to say he was at an angle from me.

Q. When you say "he" I don't know who you mean. A. Mr. Penders.

Q. Mr. Penders was at an angle to you?

A. That is the vehicle we are talking about, Mr. Penders' vehicle was at an angle from me and I noticed he was at the same speed until his brakes——

Q. (Interrupting): What do you mean? The same speed.

A. He crossed the intersection and he stayed at about the same—about an average speed until he noticed—when I could tell he noticed the vehicle. Then his vehicle speeded up.

Q. Will you designate on the board the position where Mr. Penders' vehicle speeded up, started to speed up? A. Yes, sir.

Q. Use your ruler again, will you please.

A. He was across this white line. He was crossing this white line, right here is where I noticed him.

Q. Wait a minute. Don't mark on the diagram please, until—Indicate the position that Mr. Penders' car was in when you saw his speed up, mark that.

(The witness indicates.)

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: We will call that——

The Court: H-11. [136]

Mr. Scholz: H-12, that is correct.

The Witness: H-12.

The Court: Yes, that is right.

Q. (By Mr. Scholz): Now, Mr. Penders,—did Mr. Penders keep right on that course he was following with the exception that he speeded up?

A. Yes, sir.

Q. Mr. Hartshorn, I show you herewith an affidavit purportedly made by Mose Adams also dated the 13th of May 1946. Do you recall reading that affidavit before? A. Yes, sir.

Q. Do you recall making the statement that that was correct as far as you knew?

The Court: Wait a minute. When and where? Lay the foundation for it.

Mr. Scholz: Yes.

Q. Do you recall me showing you that affidavit in the office of the United States Attorney yesterday afternoon? A. Yes, sir.

Q. And you read it at that time? A. Yes.

Q. Did you make the statement that that statement was correct?

A. Well, sir, as near as I can tell. His statement, I wouldn't know his statement. [137]

Q. Did you make the statement it was correct as far as you know?

A. That I don't remember.

Q. Do you recall me asking you if that statement

(Testimony of Edwin H. Hartshorn.)

was correct? That was only yesterday afternoon.

A. I don't remember whether you did or not, sir.

Q. Well, do you recall me giving you that statement? A. Yes, you gave me a statement.

Q. Do you recall me asking you any questions about that statement?

A. You asked me quite a few different questions.

Q. Did I ask you any questions about that statement?

A. I do remember you asking me questions. What they were I don't remember.

Q. The question I asked you was that statement true as far you know?

A. I don't recall that, sir.

Q. Would you say that wasn't true?

A. No, I wouldn't say it was true because I don't recall it. I was up there——

Q. Well, Mr. Hartshorn——

The Court: Wait a minute. You interrupted him there.

The Witness: I don't recall it. I was up there talking to you. I don't recall just all that was said, no. We was busy talking away there. I wanted to get off and eat right at the time and I don't recall just what we all did say. [138]

Q. We weren't up there very long, were we?

A. No.

Q. How long, about five minutes?

A. About ten, I should say.

Q. About ten minutes. Now, will you read that

(Testimony of Edwin H. Hartshorn.)

statement over and see if it isn't correct as far as you know.

(The witness reads.)

A. As far as I know, it would be accurate all but for one thing. I didn't see the other car.

Q. You didn't see the other car.

A. I didn't see Moses Adams. As I told you yesterday—I do believe I told you that I thought Moses Adams was a sailor, was one of the Navy men. There was some Navy man came up there. At the time I didn't see any civilian vehicles there.

Q. But that statement is correct except you don't recall at this time seeing any other vehicle?

A. No, sir.

Q. The rest of it is correct?

A. That is right, sir.

Mr. Scholz: I will offer that in evidence. This is a carbon copy.

Mr. O'Donnell: I am going to object to that, if the Court please. It isn't his statement. It is made by another individual. He might use it for the purpose of impeachment of this witness to the extent it showed a difference of what was said [139] yesterday and what was said today in court, but as far as admitting the statement into evidence, it isn't binding on us. It is purely hearsay not made in our presence.

The Court: The statement is used to impeach this witness. I don't know what is in the statement,

(Testimony of Edwin H. Hartshorn.)

but if there is anything that conflicts with what this witness says, there is in the statement which he says now is correct except for—in one particular it would seem that that would be a valid impeachment.

Mr. O'Donnell: All right.

The Court: Let me examine this thing. There is no jury here anyway.

(The Court reads statement.)

The Court: I can't understand this statement.

Mr. Scholz: I can't make much out of it either.

The Court: It says here, "an army car after having passed me cut back into the righthand lane at no increase in speed. As I arrived at the start of the downgrade at Fremont Street near the intersection of Park Avenue, I noticed a green sedan which was at this instant in the right middle lane of the highway." Right middle lane of the highway, what does that refer to, going east or going west?

Mr. Scholz: That I don't know what it is either.

The Court: Then it says, "Headed for the right land." What the right land would be I don't know, apparently——

Mr. Scholz: I think that is merely a typographical error. [140] I think that is clearly, land means lane.

The Court: The right lane, but which right lane?

Mr. O'Donnell: I don't know.

The Court: Apparently for Park Avenue, seem-

(Testimony of Edwin H. Hartshorn.)

ingly attempting to go ahead of the oncoming car. I will admit the affidavit, but I don't——

Mr. O'Donnell: Now, do I understand it isn't put into evidence as to its content, may it please the Court, but purely for the purpose of impeachment?

The Court: That is right.

Mr. O'Donnell: I see.

Mr. Scholz: That is all.

(Thereupon statement was received in evidence and marked Defendant's Exhibit E.)

(Testimony of Edwin H. Hartshorn.)

DEFENDANTS' EXHIBIT E

State of California,
County of Monterey, Fort Ord—ss.

Moses Adams, Apt. #8, Wilshire Motel, Monterey, Calif, testifies, deposes and says:

Affidavit

Having been warned of my rights and that I could remain silent and that any statement I might make could be used against me and read at a Court Martial, I voluntarily make the following statement of my own free will and without threat or promise of reward or immunity:

"That at about 1830, 11 May 1946, I witnessed a motor vehicle accident in which an army vehicle, operated and occupied by two Military Policemen, and a sedan, of a faded green tone, operated and occupied by civilians, collided.

"Just prior to the collision the army vehicle had just passed me. As I was traveling at about 30 MPH, I would estimate the speed of the army car as being approx 35 and not over 40 MPH, as he traveled alongside of me for quite a distance prior to passing me. Furthermore, there was another vehicle which was traveling in the same lane and direction, towards Monterey, just ahead of the army car. The army car, after having passed me, cut back into the right hand lane at no increase in speed. As I arrived at the start of the downgrade

(Testimony of Edwin H. Hartshorn.)

of Fremont St. near the intersection of Park Ave, I noticed the green sedan which was at this instance in the right middle lane of the highway proceeding diagonally across Freemont, headed for the right land and apparently for Park Ave. and seemingly attempting to do so ahead of the oncoming army car.

"The collision happened so suddenly that further details are not all quite clear to me, but I recall seeing the army vehicle swerving to the right as though attempting to avert colliding with the sedan, but was unsuccessful.

"I then noted that several sailors nearby heading towards the collision, so therefore I did not stop but hurried to where I knew an ambulance was always standing and on arrival there notified them of the accident."

/s/ MOSES H. ADAMS,
Apt. #8, Wilshire Motel
Monterey, Calif.

Subscribed to before me this 13th day of May 1946.

/s/ R. E. GUENETTE,
Capt, CMP.

A Certified True Copy:

/s/ HOWARD C. CURTIS,
Lt Col, CMP
Provost Marshal.

Incl #4

[Endorsed]: Filed April 15, 1949.

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: Is that all?

Mr. Scholz: That is all.

Mr. O'Donnell: Just one minute.

Redirect Examination

By Mr. O'Donnell:

Q. Now, to the best of your recollection, I think you testified yesterday there were no cars other than the Penders, the Penders' automobile traveling in an easterly direction along Fremont Extension.

A. No, there wasn't, sir, not between me and Mr. Penders.

Q. At that time you were in the outer lane of the eastbound traffic, is that correct? [141]

A. That I was, yes, sir.

Q. And other than the army vehicle which was traveling westerly there were no other cars in front of him?

A. There were no other vheicles, no, sir.

Q. Now, you tell us that you noticed the driver of the army vehicle turned to his right, is that correct? A. That is right, sir.

Q. ——immediately preceding the accident?

A. That is right.

Q. And by turning to his right he was turning towards Park Avenue, isn't that correct?

A. That is right, sir.

Q. Did he make any attempt whatsoever at any time while he was within your observation to turn to the left?

(Testimony of Edwin H. Hartshorn.)

A. No, the car never turned to the left at all, sir.

Q. I see. Had he turned to the left, he would have avoided Mr. Penders' automobile, would he not? A. That he would, sir.

Mr. Scholz: I object to that. You can't have this witness be your judge.

The Court: Sustained.

Mr. O'Donnell: I just got my habits from the way you were cross-examining him. I think that is all.

Mr. Scholz: That is all.

The Court: I wonder if I could ask the witness a question? [142]

Mr. Scholz: That's all right.

The Court: Q. When you signed this affidavit which was made up two days after the accident, May 13, where did this man interview you?

A. He interviewed me, sir, at the—yes, it was the Cottage Court.

The Court: Q. And you say that you were shaving at the time? A. Yes, sir.

Q. What did he do, just write notes down?

A. Yes, sir, he just asked me a few questions about the accident. He told me that he had seen this other Moses Adams, but he didn't say whether he was a civilian or a sailor or what he was.

Q. Well, after he wrote the things down that you told him, what did he do then, go and get—did he write the affidavit out there or——

A. (Interrupting) He wrote it out right there,

(Testimony of Edwin H. Hartshorn.)

yes, sir. I finished shaving and got ready for work, sir.

Q. You didn't swear to it before anybody, then, did you?

A. No, sir, I didn't swear to it before anybody. There was nobody around, just the officer himself.

Mr. Scholz: Well, that—may I ask a further questions?

The Court: Just a moment.

Q. Now, at the time you prepared that affidavit you used the expression about 100 feet west of Park Avenue was where this [143] Penders car started to slant into the—as you expressed it, into the east —the westbound—the westbound lane?

A. The Penders' car, yes, into the westbound, yes, that is right, sir.

Q. Now, are you sure—had you been out there to measure the thing off before you made the affidavit to see whether——

A. No, I hadn't at all. At the time the accident occurred I had a bus with 27 passengers at the time the accident occurred, that is the heavy time of day for passenger travel. There wasn't any automobiles on the road at the time and it was right after the war, as you recall. I had about 25 passengers on at the time.

The Court: Q. This 100 feet of yours is—was that just an estimate or a sort of a rough estimate?

A. That is right, sir, that is just my own opinion as I looked around the road and tried to control

(Testimony of Edwin H. Hartshorn.)

the bus and watch the accident at the same time.

Q. It might have been 50 feet or it might have been 150? A. That is right, sir.

Q. But your impression of it was, of what you observed was the man—go down and indicate on the board the path that that automobile, the Penders' car, took with regard to where—the 100 feet or anything else.

The Witness: The path that the Penders' car took?

The Court: Yes. [144]

The Witness: Right here was where I said he crossed. He just came around like this, and he continued on and right in here is where he was—right in here I believe it was *was* where the car collided, the two cars came together.

The Court: Well, he is pointing at a place called —somewhere near H-6. Well, in other words wasn't the slant from down there into there (indicating)?

A. No, this, I believe, was where we made the mistake yesterday, where we measured the five inches, from where the vehicles stopped down here and I was figuring—what I was trying to figure was from here to here.

The Court: All right, then, it would be from there that he came in like that? A. Yes.

Q. That is what you mean to testify?

A. That is what I meant.

The Court: That is all.

Mr. O'Donnell: That's all.

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: Now I have a few questions.

Q. Now, this officer of the United States army introduced himself to you at the time you made this deposition.

A. I don't know if he did. I can't remember, sir, whether he told me whether he was from the legal office or where he was from.

Q. You were in the army? [145]

A. Yes, sir.

Q. And you know what a corporal in military position is? A. Yes, sir.

Q. He was in a military position, wasn't he?

A. Well, I didn't know, sir. He was just dressed in officer's uniform. He didn't show me any identification or anything like that at all. As far as I know, he was just a lieutenant.

Mr. O'Donnell: A lieutenant?

The Witness: That is right.

Q. (By Mr. Scholz): How long were you in the army?

A. I was in the army for four and a half years.

Q. You were in the army for four and a half years and you don't know the difference between a lieutenant and a captain?

A. Well, I couldn't remember. Was he a captain, sir?

Q. That is all in evidence here.

A. Well, if he was a captain just from noticing, I haven't paid any attention to him at all, sir, whatsoever.

(Testimony of Edwin H. Hartshorn.)

Q. But he told you he was investigating this accident?

A. That is right, he said he would like to get a statement from me.

Q. And he asked you the questions?

A. He asked me the questions.

Q. And then he wrote down as you——

A. He put them in a notebook and took them out at the car. I was dressing at that time. It was only a one-room cottage. [146]

Q. I don't care about the one-room cottage, but I mean, did you—he wrote the questions down as you told them, is that right—the answers down as you told him?

A. Yes, he just asked me questions and he just jotted it down.

Q. And he told you the purpose of the discussion with you?

A. Well, I didn't know at the time they were going to fight the case. He just said that he wanted to get the questions that he wanted to ask me, that is all, and I just said——

Q. (Interrupting) Did he tell you he wanted to get the facts of this case?

A. That is right, and I just, I just answered him the best I could at the time on the little bit he asked me.

Q. Now, yesterday you stated that the impact of the two cars caused the cars to move from eight to ten feet, is that correct?

(Testimony of Edwin H. Hartshorn.)

The Court: No, he didn't. He made it at first 16.

Mr. Scholz: Yesterday——

The Witness: 10 or 15 feet, wasn't it?

Q. (By Mr. Scholz): Then I asked him he didn't make the statement eight or ten feet.

The Court: Ten, you said, and he didn't quite know which it was. That is my recollection.

Mr. Scholz: If Your Honor please, my notes indicate he said the first statement 15 feet and then——

The Court: On direct examination he said 15 or 16 feet.

Mr. Scholz: That is right. And then when I asked him if he [147] didn't state to me it was eight or ten feet, he answered yes.

The Court: Then he said—well, it was substantially to that effect, you said eight or ten feet——

Q. (By Mr. Scholz): Now——

The Court: He wasn't quite sure.

Q. (By Mr. Scholz): The collision, I mean, the cars came to rest just about the edge of the pavement at the curb here, is that correct, after the impact?

A. That is right, sir. It was right by the street sign.

Q. Then, to the best of your ability now, the best of your knowledge now, it moved—the cars moved eight or ten feet.

A. After they came——

Q. After the impact?

(Testimony of Edwin H. Hartshorn.)

A. After the impact in the intersection, they went back down—the army vehicle drove Mr. Penders' car back down the hill.

Q. Eight or ten feet?

A. That is—somewhere around in there.

Q. And therefore the collision or the Penders' car could not have—well, that is argumentative. No other questions.

Mr. O'Donnell: I think that is all. Thank you.

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Scholz: If Your Honor please—did you subpoena Lieut. Marinello?

Mr. O'Donnell: No, I did not. [148]

Mr. Scholz: With the permission of the Court and of Mr. O'Donnell, may we call Lt. Marinello out of order? He is on our case and has been subpoenaed, but he wants to get back to Monterey, and I think it would only be fair to cooperate. Lieutenant, will you take the stand, then?

FRANK C. MARINELLO

called as a witness on behalf of the United States; sworn.

The Clerk: Will you state your name to the Court? A. Frank Marinello.

(Testimony of Frank C. Marinello.)

Direct Examination

By Mr. Scholz:

Q. Will you please state your occupation?

A. Lieutenant of police, Monterey Police Department, Monterey, California.

Q. And were you such on May 11, 1946?

A. I was.

Q. I hand you herewith Defendant's Exhibit B, being a vehicle accident report to which is attached in typing a statement typed. That was signed by you, Lieutenant?

A. That report was typed out by Officer Davenport under my supervision and signed by me.

Q. By Mr. Davenport? A. Yes, sir.

Q. Now, calling your attention again to May 11, 1946, what was the speed limit on Fremont Street on that date? A. A 55 mile zone. [149]

Q. I want to refer to your notes, Lieutenant, so I will just let you have them there in case I will ask you some questions and then you may refresh your memory.

Q. You investigated an accident on May 11, 1946? A. Yes, sir.

Q. And what time did you reach the scene of the accident? A. 6:41 we received a radio call.

Q. And how soon did you arrive there afterwards, approximately at the scene of the accident?

A. Approximately 6:45, about three or four minutes later.

(Testimony of Frank C. Marinello.)

Q. And was—a collision had taken place just prior to your arrival? A. Yes, sir.

Q. And that was involving a 1934 Hupmobile and an army panel truck? A. Yes, sir.

Q. You are quite familiar with Fremont Street, are you not? A. Yes, sir.

Q. Could you tell me, if you know, at a point approximately 155 feet east of the center of Park Avenue where it runs into Fremont Street and which is designated on this diagram, if you could see an automobile sitting in the Cadillac automobile —I believe you drive a Cadillac? A. Yes, sir.

Q. ——if you could see an automobile at the intersection of [150] Augajito Road and Fremont Street, assuming that this Cadillac automobile that you were sitting in is on the north lane of Fremont Street?

Mr. O'Donnell: I am going to object to that, may it please the Court, on the ground that it calls for the conclusion of the witness, and further, on the ground that there is no testimony—that is, the question is not qualified by any conditions under which the view of the road might be made from the distances and the points that Mr. Scholz has mentioned. The testimony here is, as far as Mr. Hartshorn is concerned, he was eight feet — his vision was eight feet above the level of the ground. Now, if the lieutenant is in a position to tell us in what regard, which I think he would be qualified to do but not until some foundation is laid here. I do

(Testimony of Frank C. Marinello.)

not think the lieutenant is in a position to testify and answer the question as put by Mr. Scholz.

Mr. Scholz: May I just simplify matters? May I withdraw that question and ask the lieutenant——

Q. Have you checked the vision on that street near the interesection of Park Avenue?

A. I have.

Q. And you have checked that sitting in what kind of a car? A. Sitting in a Cadillac sedan.

Q. All right. Will you tell the Court, or indicate on the diagram, what range of vision you checked?

Mr. O'Donnell: Just before that question is answered, the only purpose of that testimony, as I can make it out, would be in the way of impeachment of the witness Hartshorn.

Mr. Scholz: Not necessarily so. I want to bring to the Court the evidence that due to the angle of the road and due to the incline of the road, I want to have the Court have the benefit of what vision an automobile would have.

The Court: What is it you want to bring out from this witness? Looking east on Fremont from west of Park Avenue, how far you can see up Fremont?

Mr. Scholz: What I wanted to do generally, Your Honor, is put—of course, I don't know myself, but he checked this vision and I wanted to tell the Court what vision you have of this street near this accident. We will take it at different angles if he can so testify. I don't know what he is going

(Testimony of Frank C. Marinello.)

to testify to. I think it is important that the Court have this information, to know what the vision is on that street, because there is a definite incline up to the intersection and there is a definite dogleg. I think the Court in order to decide the case should have—should be acquainted with all the facts and one of the facts is the vision.

The Court: I think I will admit it.

Mr. Scholz: Will you answer the question? Will you read the question, Mr. Reporter?

Mr. O'Donnell: This will not be impeaching the testimony—— [152]

The Court: The only point he wants to bring out is the vision, the length of vision that you can see looking eastward or looking westward either way.

Mr. Scholz: Westward, that is right.

The Witness: May I step down for a minute?

Q. (By Mr. Scholz): Take your time, Lieutenant, and explain to the Court—we want to advise the Court of the facts so that the Court may know.

The Court: Would you ask the witness when he made this investigation.

Mr. Scholz: I will ask him that.

Q. I will ask under what conditions, as a lieutenant of the Police Department——

The Court: When did you make this?

A. April—I mean, that is right, April the 13th at 12:30 p.m.

Mr. O'Donnell: I will stipulate the conditions

(Testimony of Frank C. Marinello.)

of the road are practically the same as on May 11, 1946, there has been no change.

A. That is right.

Q. (By Mr. Scholz): All right. Will you answer that question?

(Question read.)

The Witness: From the center of Park Street, that is the prolongation of Park Street.

Q. The prolongation or the center of Park Street?

A. The center of Park Street out to the edge of the highway to [153] a point 155 feet east of Park, straddling both lines, and giving the benefit, whether a car is on one lane or on the other lane and sitting in the Cadillac anything beyond 155 feet you would not have visibility of anything coming the opposite direction. At a point 155 feet you begin to get a vision.

Mr. Scholz: Thank you very much.

The Court: That is traveling west?

A. Traveling west, yes, sir.

The Court: Wait a minute—traveling west——

Mr. Scholz: That is towards Monterey, Your Honor.

The Court: Toward Monterey.

The Witness: That is right, it is.

The Court: 155 feet from the prolongation of the——

The Witness: The center.

(Testimony of Frank C. Marinello.)

The Court: The center of Park Avenue into Fremont Street——

A. Yes, sir.

Q. You wouldn't have vision——

A. Of any cars coming over from a westerly direction to an easterly direction.

Q. (By Mr. Scholz): Will you indicate on the diagram, stand on the side and just explain it by pointing. You mean there would be 155 feet here straddling this white line? A. Yes, sir.

Q. You are approximately 155 feet east of the center of Fremont Street—— [154]

A. Of Park Street.

Q. At this point here where——

A. That is the center of Park, there is a small plug there about the size of this plug on the floor. That is the extreme center of Park Street.

Q. And from a distance of 155 feet, then——

A. You get a vision.

Q. ——you get a vision down to this point?

A. For anything, because the minute you hit the vision you hit the vision of the entire highway. Beyond that you can not see anything.

The Court: In other words, what you mean is, if you are east more than 155 feet you can't see anything on Fremont Street.

A. No, sir.

Q. But when you reach a point 155 feet from the center line of Park Avenue, then you can see all the way? A. That is right.

Q. West on Fremont, is that it?

(Testimony of Frank C. Marinello.)

A. That is right.

Q. And there is, I would assume, about a ten foot jog in the road, and about a twenty foot—do you mean you are sitting in an automobile or standing up or sitting in the top of a bus?

A. Well, I said sitting in a Cadillac.

The Court: You mean sitting in the Cadillac.

The Witness: On the top of a bus you would reach it sooner than 155 feet.

Mr. O'Donnell: Is that a new Cadillac or an old one?

The Witness: A 1948.

Mr. Scholz: They always drive new Cadillacs.

Mr. O'Donnell: One is lower than the other one.

Q. (By Mr. Scholz): Now, I think you stated that there is approximately a ten foot jog in the road.

A. Before approaching—that is, there is a jog there at the start approaching right there at Park Street.

Q. Will you indicate on the diagram here——

The Witness: In other words, this section of highway.

Q. That section (indicating)?

A. A ten foot jog in this highway.

Q. For the purpose of the record, indicating it turning—indicate the jog on the diagram.

A. This runs straight and this jog begins here.

Q. Begins approximately at the center of Park Street? A. That is right.

(Testimony of Frank C. Marinello.)

Q. Park Avenue, I should say, and there is, I think you testified, there is about a twenty foot upgrade? A. Upgrade.

Q. Upgrade going east on Fremont Street?

A. Upgrade going east.

Q. To about where, what point? [156]

A. Well, I would say at about where you begin getting your visibility where she stops slanting off.

Q. At about—— A. About 155 feet.

Q. 155 feet east of the center of Park Avenue?

A. Most of the grade is from the center of Park Street down, slight.

Q. In other words, most of the grade of that twenty feet is from the center——

A. The center of Park Avenue.

Q. ——west. A. It jogs—yes, west.

Q. And then there is a slight grade, though?

A. A kind of a hill crest there.

Q. A hill crest north to about 155 feet?

A. That is right.

The Court: You don't mean north 155 feet.

Q. (By Mr. Scholz): I mean east.

A. East, yes.

Q. Did you locate a witness to the accident, Lieutenant? A. No, sir.

Q. Did you discuss this case with Edwin H. Hartshorn? A. No, sir.

Q. In the report it states that Mr. Hartshorn stated to us——

Mr. O'Donnell: I am going to object to that,

(Testimony of Frank C. Marinello.)

may it please [157] the Court. He asked him and he has answered. Now, is he going to check that with the report?

Mr. Scholz: I want to ask him who did the checking.

Mr. O'Donnell: Well, ask him that, but don't be reading the statement.

Mr. Scholz: Well, all right.

The Court: I understood the witness just now to say he didn't talk to Hartshorn.

Mr. Scholz: That is what I understand, too.

Q. In the report there, Lieutenant, there is a statement regarding an interview with Mr. Hartshorn. Do you know who made that interview?

A. Officer Davenport.

Q. Did you discuss this case with—at the time of the accident, with the driver of the military vehicle? A. No, sir.

Q. Was that done by Sergeant—what was his name?

Mr. O'Donnell: Davenport.

Q. (By Mr. Scholz): Davenport?

A. Davenport, yes, sir.

Mr. Scholz: That is all. Wait a minute—that is all.

Cross-Examination

By Mr. O'Donnell:

Q. Just a minute, Lieutenant. I will only keep you a few minutes. I show you here Plaintiff's

(Testimony of Frank C. Marinello.)

Exhibit 22 and ask you whether that is a fair representation or a correct [158] representation, we will put it that way, of the condition of Fremont Avenue looking west on or about May 16, 1946?

A. Yes, sir.

Q. I see. I am pointing to an object here which appears to be the top of a billboard. Could you tell us whether that is a billboard or not? I will ask you to look at it closely. Being familiar with the vicinity, I was just wondering whether you could tell us whether that was the top of a billboard or not. A. I can't make it out.

Q. Now, I am again referring to this exhibit, this twenty foot grade that you have mentioned starts right as shown in this photograph at a point where the telephone pole is, is that correct?

A. Well, I would say that it starts at the center of Park Street.

Q. The grade starts at the center of Park Street?

A. I would say it does.

Q. Isn't it a fact——

A. I mean, there is a continuation of the hill crest, but your majority of grade is from Park Street on.

Q. I appreciate that. If you were describing the crest of that particular grade, would you not place it at approximately the point where the telephone pole is shown in that photograph?

A. Do you mean as it starts in going west?

Q. Yes, starts in going west, going down west-

(Testimony of Frank C. Marinello.)

erly, just for the [159] purpose of helping you out in answering my question.

A. Isn't that pole just about in the center of Park Street?

Q. No, no, it is on the easterly curb.

The Court: It is a little bit east.

The Witness: About 20 feet east.

Q. (By Mr. O'Donnell): I will show you here Plaintiff's Exhibit 21 and ask you whether or not that photograph can be of any assistance to you.

A. Yes, that is right. I would say so, according to the photograph.

Q. The grade starts approximately where the telephone pole is? A. Yes.

Q. Now, there is one other question on the—I want to get my directions straight here now. The highway on the—and when I refer to the highway, I mean Fremont Street, Fremont Street running west is—comes up to and is immediately adjacent to the sidewalk east of Park Avenue, is that not correct? A. There is a shoulder there.

Q. No, I am talking about east of Park Avenue, that is, towards Del Monte. A. Yes.

Q. Isn't there a sidewalk between the property line and the pavement? A. No sidewalk.

Q. There is no sidewalk? [160]

A. It is unimproved.

Q. Well, I show you here for the purpose of the record Plaintiff's Exhibit 22.

A. It is unimproved.

(Testimony of Frank C. Marinello.)

Q. It is unimproved, but there is a walkway?

A. There is a walkway.

Q. There is a walkway. O.K., fine, all right. The highway comes right up to the edge of the walkway, is that not correct?

A. That is right, that is correct. There is no curb.

Q. No, there is no curb. I appreciate that. Now, taking the north side of Fremont Avenue west of Park Avenue, the Fremont Avenue pavement does not lie immediately adjacent to the curb on the north side of Fremont Avenue west of Park Avenue, does it?

A. No, there is an unimproved area there.

Q. There is an unimproved area there. That unimproved area, according to our stipulation, is 16 feet wide, is that not correct? A. Correct.

Q. So you have a much wider area west of Park Avenue than you have east of Park Avenue?

A. That is correct.

Q. Is that correct?

A. The diagram is correct.

Q. Uh-huh. Just pardon me one moment. I think that will be [161] all.

Mr. Scholz: I have one or two more questions.

Redirect Examination

By Mr. Scholz:

Q. Lieutenant, I hand you herewith Plaintiff's Exhibit 18. That was taken there shortly after the accident, wasn't it? A. Yes, sir.

(Testimony of Frank C. Marinello.)

Q. But I think——

A. At our arrival at the accident, I got to work immediately on it.

Q. I show you there a pole. It shows in this picture, the pole——

The Court: What is that exhibit?

Mr. Scholz: 18.

The Witness: 18.

Q. So that you can follow this, may I show you two copies of the picture, that is Exhibit—would you indicate on the diagram where that pole is?

A. Well,——

Q. In other words——

A. Of course you have to place your car at the scene to see that they are correct.

Q. Well, whatever you do, I mean just give it to the Court.

A. According to your board here, it would be this pole.

Q. That is what I mean. [162]

A. That is the pole.

Q. The pole, is it not, in Plaintiff's Exhibit 18?

A. That would be this pole.

Q. ——is the pole designated on the diagram and we will mark that M-1. I see. Now, from the—from this picture, by coordinating it, and by the designation of the pole on the diagram, would you indicate the position of those two automobiles when this picture was taken? Indicate that on the diagram.

(Testimony of Frank C. Marinello.)

A. Well, it would be pretty hard to put the cars in their position without going through all those measurements to see that they are in their proper place.

Q. Could you do it briefly?

A. I think it is 53 feet 10 inches.

The Court: Speak a little louder.

The Witness: I believe it is 53 feet 10 inches from the center of Park Street to the front of the MP panel wagon.

The Court: I didn't hear that.

The Witness: From the center of Park Street to the MP wagon, that is the MP car—this is the center here and then you have here—you have 70 feet here and this is the chart here, 53 feet 10 inches from the center of Park.

Mr. O'Donnell: Mark it on the map according to scale.

Mr. Scholz: Yes, using that diagram and your knowledge and your measurements and the photograph, indicate to the best of your ability the position of the government vehicle when you [163] saw it.

Mr. O'Donnell: I wonder if you have a colored pencil that you can use, a colored pencil that will designate it.

A. Well, 53 feet 10 inches, this rule is—I mean the scale here is, one inch is 20 feet, two and a half inches would be 50 feet, correct?

Mr. Scholz: Yes, that is it.

(Testimony of Frank C. Marinello.)

The Witness: And two and three-quarters inches would be approximately—54 feet, right?

Mr. O'Donnell: Well, a little more than that.

The Witness: Well, we will make it 1/32nd off. I would say this would be the front of the government vehicle here.

Mr. Scholz: Now, I suggest you might make a little square or something so we won't confuse it.

A. I want to get this other dimension before I start off. To a point eight feet, eight feet eight inches from the north curb of Fremont, which would be this curb in here.

Q. Yes.

A. At a point eight feet would be a little less than half an inch, say about 7/16, right?

Mr. O'Donnell: Yes.

The Witness: So this would be it, here. Now we can start the—square this off, produces the actual position of your car.

Mr. O'Donnell: The government car.

Mr. Scholz: The government car. Now, will you draw a line [164] out there and make that——

Mr. O'Donnell: M-2.

Mr. Scholz: M-2. Just draw that down there. Draw a little line here and put M-2 there. That is all. Now, can you designate the position of Mr. Penders' car?

A. Well, Mr. Penders' car was almost diagonal to the army car. This would be a little more—the Penders' car was almost diagonal to this, to the

(Testimony of Frank C. Marinello.)

curbing. Of course, his car is not to scale.

Q. We appreciate that.

A. That would be the actual——

Q. Now, will you mark that?

The Court: M-3 is it.

Mr. Scholz: M-3.

The Witness: M-3.

Mr. Scholz: I think that is all. Any questions?

Mr. O'Donnell: That is all, Lieutenant.

Mr. Scholz: Your Honor, may I substitute copies for the Defendant's Exhibit B? The lieutenant wants them back. They are from his official files.

The Court: Well, we haven't read them into the record and I wouldn't have—I wouldn't have them before us in the argument.

The Witness: I mean there is no immediate hurry.

Mr. Scholz: We will return them to you.

The Witness: As long as we get that back. [165]

The Court: We can make photostatic copies and send them back to you.

Mr. O'Donnell: Mr. Scholz is very anxious to get a seat in church and he has asked me if I would ask Your Honor, good Catholic that I am, to adjourn about fifteen minutes before 12:00.

The Court: That is satisfactory to me, but when to?

Mr. Scholz: I think Tuesday.

(Thereupon an adjournment was taken to Tuesday morning, at 10:00 o'clock a.m.)

Tuesday Morning Session
April 19, 1949, 10:00 o'Clock

The Clerk: Penders v. United States; for further trial.

Mr. Scholz: Ready, Your Honor.

Mr. O'Donnell: Ready.

Mr. Halsing: We would like to call Mr. Penders.

WALTER L. PENDERS

called in behalf of plaintiff; sworn.

Direct Examination

By Mr. Halsing:

Q. Mr. Penders, you are the plaintiff in this action, is that correct? A. That's right.

Q. Where do you live?

A. I live in Pacific Grove.

Q. That is in Monterey County, California?

A. Yes.

Q. How long have you lived there?

A. About 24 years.

Q. Mr. Penders, calling your attention to the date of May 11, 1946, late in the afternoon of that day, where were you? A. I was at home.

Q. Did you leave your home that afternoon?

A. I left that afternoon.

Q. With whom? [167]

A. I left there with my wife and a couple of friends.

Q. Did you own an automobile at that time?

(Testimony of Walter L. Penders.)

A. Yes, I did.

Q. What type of automobile was that?

A. It is a Hupmobile.

Q. What year? A. 1946.

Q. Was it 1936? A. '36, yes.

Q. When you left your home, were you driving your automobile? A. Yes, I was.

Q. You said your wife was with you. Where was she in the automobile?

A. She was sitting right back of me in the back seat. Your Honor, I am speaking a little louder because since the accident I am a little deaf.

Q. Where did you go when you left home?

A. We drove up to Monterey, went out Monterey, out Fremont Street, and we were going out to dinner. Do you want me to tell about that?

Q. Yes.

A. We were going out to dinner. We stopped at a place on the highway there at Fremont Street.

Q. Where was that place with relation to Park Avenue?

A. It was about a few hundred yards from where the accident [168] happened.

Q. Was it west or east of Park Avenue?

A. East of Park Avenue. It is between Park Avenue and Monterey.

Q. Therefore, it would be west of Park Avenue? A. Yes.

Q. What happened after you reached this restaurant?

(Testimony of Walter L. Penders.)

A. Well, we got out and saw that the restaurant was closed and we got in and I said, "We will drive up to the next crossing and go back to Monterey and get our dinner there."

Q. What was the next crossing?

A. The next crossing was Park Avenue.

Q. You say you got back into the automobile?

A. Yes.

Q. Did you then drive toward Park Avenue?

A. We drove down toward Park Avenue.

Q. What direction was that from Fremont Street? A. That was east.

Q. You were going east? A. Yes.

Q. As you approached Park Avenue, what did you do?

A. Well, as I approached it, I went—it was a four lane drive there, I drove over onto the center line and I had my hand out there for over a hundred yards before I reached Park Avenue.

Q. Were you familiar with this map? You are, are you not, Mr. Penders? [169] A. Yes.

Q. Would you step down here, please? I hand you here a blue pencil, Mr. Penders. Will you indicate on the map the spot before you reached Park Avenue when you commenced your turn?

A. Commenced my turn?

Q. Yes. A. Here (indicating).

Q. You are indicating the spot. This is west. That is Monterey, that way.

(Testimony of Walter L. Penders.)

A. Oh, this is west? I came in here, came along here.

Q. Indicating the lane for the east-bound travel.

A. Just before I got to it, you mean?

Q. Yes. Before you got to Park Avenue.

A. Before I got to Park Avenue. It would be the inner lane.

Q. Take your time.

A. This is turned around.

Q. Mr. Penders, this is Park Avenue. This is Fremont Street. A. Yes.

Q. Monterey lies over in this direction toward the west.

A. Well, you come in, here is the double line; when I looked down there—if you turned it around, it would be just the reverse.

Q. Take your time.

The Court: Why don't you turn it around for him?

Mr. Halsing: You mean upside down? [170]

The Witness: Yes; upside down.

Mr. Halsing: We will turn the whole board around, this way.

A. Yes; that is more like it. This would be west, here.

Q. Yes. A. Yes; that's more like it now.

Q. Where were you as you approached Park Avenue, in which lane; in which lane were you driving as you approached Park Avenue?

A. In this lane here.

(Testimony of Walter L. Penders.)

Q. Indicating the inner, east-bound lane?

A. Yes.

Q. The inner east-bound lane?

A. Yes. I came along here. When we got here——

Q. Put a mark where you are going to indicate.

A. I was coming along here.

Q. One moment. You are indicating the inner east-bound lane.

A. Coming along here. When I got about here where I made the turn, you mean?

Q. I want to know where you were as you approached Park Avenue?

A. I was on this lane here.

Q. The inner lane? A. Yes.

Q. Put a mark on the map where you started to make your turn from the inner east bound lane into Park Avenue. [171] A. Right here.

Q. I will mark that P-1. When you reached the point of P-1, which is this mark that you have just made on the map, did you look along Fremont Street? A. I did.

Q. Did you look in an easterly direction?

A. Yes.

Q. Did you see any cars coming?

A. None whatsoever.

Q. You did not see any cars coming at all?

A. No.

Q. Then did you give your signal?

A. In making the turn, certainly; I had my hand

(Testimony of Walter L. Penders.)

out all the way from down here, over 100 yards coming up, I had my hand out to make this turn.

Q. You indicate you had your hand out from a point opposite Auguscito Road? A. Yes.

Q. Did you do that after you looked?

A. I made the turn; after I made the turn I looked ahead and I saw this car coming at a tremendous speed.

Q. Where was your car when you first saw this car coming?

A. It was just turned across the highway, turning up in here.

Q. Indicate with your pencil where the front of your car was when you saw the vehicle approaching you; you indicate P-1 as [172] where you started to turn? A. Yes.

Q. Where was the front of your automobile when you saw this car coming?

A. Just about the length of the automobile I was turning.

Q. Indicating the center lane of the west-bound traffic? A. Yes.

Q. Will you put a mark where you say the front of your car was when you saw this vehicle? We will mark that P-2.

Mr. Scholz: P-2 is where he saw the other car?

Mr. Halsing: Yes; the oncoming automobile for the first time. At this point is where Mr. Penders said he started to cross the center line in making his lefthand turn, indicated by P-1. He indicated

(Testimony of Walter L. Penders.)

that at P-2 he first saw the oncoming automobile and at point P-2, he has placed it right on the center line of the westbound travel.

The Court: Yes.

Q. (By Mr. Halsing): What happened next after you saw the oncoming vehicle and your automobile was at this point, P-2; what happened?

A. He came over the hill at a tremendous speed. It seemed like it was only a second he was on me. I looked and his car was skidding, it was swaying. Finally, as I saw him go in back of me, I stepped on the gas to go ahead. As I stepped on the gas to go ahead, I saw him then a few feet away from me, coming [173] right for me, and he struck the front end of the car.

Q. Where was your car at the point of impact? Will you take the stand again? I will indicate the mark that the plaintiff just made with the letter and number P-3 indicating a point on the northern side, what would be beyond the northern edge of the westbound traffic line.

Mr. Scholz: What is that?

Mr. Halsing: P-3. He said that is the point of impact.

The Court: The point of impact.

Q. (By Mr. Halsing): Mr. Penders, what happened after the impact?

A. Well, I don't know what happened then; I was unconscious and, in fact, everybody in the car was, too.

(Testimony of Walter L. Penders.)

Q. Were you hospitalized as a result of the accident? A. Yes.

Q. Had you received any personal injuries?

A. Yes, I had. I had my leg broken and my arm broken and several bad cuts on the scalp.

Q. You were in the hospital being treated for your injuries? A. Yes, I was.

Q. Confining yourself to the injury to your wrist, what did you say happened to it?

A. My left wrist here, badly broken and it was shattered, as the doctor stated. It was——

Mr. Scholz: Not what the doctor stated. [174]

A. Well, my wrist is very bad now; it was shattered. It bothers me a great deal now. I can't use it. I lost control of those fingers; I can't grasp it so well.

Q. (By Mr. Halsing): What treatment did you receive?

A. It was in a cast about seven months, six or seven months; pretty near seven months.

Q. What treatment was given to the wrist?

A. After the cast was removed, then I had a leather support put on there, and I wore that for a number of months.

Q. Did you wear that after you were dismissed from the hospital? A. Yes.

Q. Do you have any permanent injury to your wrist as a result of the accident?

A. Well, no strength; I can't pick up things, and the fingers here, it affected all these cords here, the nerves in my fingers.

(Testimony of Walter L. Penders.)

Q. Does the wrist brother you at all now?

A. Yes. It bothers me a great deal. If I use it a little bit or exercise too much, quite a pain comes up my arm here to my elbow.

Q. Confining yourself to the injuries to your leg, which leg was injured? A. The left leg.

Q. Going back to the wrist again, you were indicating something on your wrist; what is the damage to your wrist; just describe [175] that and show His Honor.

A. Well, it was broken, the bone was badly shattered. You couldn't make a good joint there.

Q. Do you have any deformity there from the injury?

A. Yes, I have. The bone protrudes—well, you can see it. It was broken there. It was shattered so that it is impossible to make a perfect joint there.

Q. Did you have that condition before the accident? A. No.

Q. Was your hand and wrist normal before the accident? A. Yes, yes.

Q. With reference to your left leg which you say was injured, what damage was done to that?

A. The leg was broken and the bones were shattered, here (indicating).

Q. You are indicating where?

A. This knee, in the left knee here.

Q. What treatment did you receive?

A. It was in a cast for about seven and a half or eight months.

(Testimony of Walter L. Penders.)

Q. Was any treatment given to the leg after the cast was removed?

A. Yes; I had an elastic support put on there and I wore it quite a few months, too.

Q. Did you wear that after you were released from the hospital? A. Yes. [176]

Q. Do you suffer any pain now?

A. It bothers me. I can't walk with it. It pains me and I have to rub it to kind of get the circulation in it. The muscles contract here.

Q. Are you able to walk as well as you were before the accident? A. No, not at all.

Q. Why was that?

A. The leg joint here, the knee joint protrudes a great deal like my wrist does. It was a bad break. It will never be the same and it pains me; at times at night it wakes me up and I have to straighten it out and rub it to take that pain out of it.

Q. Was your leg in that condition prior to the accident? A. No, not at all.

Q. Was it a normal leg? A. Normal leg.

Q. I show you Plaintiff's Exhibit No. 7. Will you look those bills over, Mr. Penders?

A. Yes, these are the bills.

Q. Those bills indicate you were in the hospital from the period May 11, 1946 to March 25, 1947. Are those the bills that were rendered to you for your care while in the hospital?

A. Yes; those are the ones.

Q. I show you Plaintiff's Exhibit No. 6 pur-

(Testimony of Walter L. Penders.)

porting to be a bill for medical care and attention. Is that the bill that was [177] rendered to you by Dr. Hugh F. Dormondy? A. Yes.

Q. That was for your care while you were in the Monterey Hospital? A. Yes.

Q. Mr. Penders, you stated that your wife Florence Penders was also injured in this accident?

A. Yes; very badly injured.

Q. Was she hospitalized as a result of the accident?

A. Yes, up to the time she passed away.

Q. That was from May 11, 1946——

A. From May 11, 1946 until Palm Sunday. She passed away a week ago last Sunday.

Q. During the period of time that Mrs. Penders was in the hospital, who was her doctor?

A. Dr. Dormondy.

Q. I show you here Plaintiff's Exhibit 13 purporting to be bills from the Monterey Hospital, Ltd. for service and care to Mrs. Florence Penders. I will ask you to look at those and tell us, if you can, whether those are the bills that were rendered to you by the Monterey Hospital. Are those the bills that were rendered to you for care given to Mrs. Penders? A. Yes.

Q. I show you Plaintiff's Exhibit No. 12, Mr. Penders, purporting to be a bill for medical care and attention from the [178] Monterey Clinic for service rendered to Mrs. Florence Penders. Is that the bill that was presented to you by Mr. Dormondy?

(Testimony of Walter L. Penders.)

A. Yes; they are the ones, that's right; those are the bills.

Q. Now, Mr. Penders, you say your wife passed away on April 10th, was it, 1949? A. Yes.

Q. How long were you and Mrs. Penders married? A. We were married in 1905.

Q. Were you and Mrs. Penders living together constantly during that time?

A. Constantly, ever since.

Q. Were you ever separated for any length of time from Mrs. Penders?

A. No; only about a month. Approximately about a month, that is all. We have never been separated. We have always been together.

Q. When was that month, approximately what year?

A. It was—that was 35 years ago, I guess.

Q. That is the only time you and Mrs. Penders were separated for any length of time?

A. Yes.

Q. Did you and Mrs. Penders travel about quite a bit? A. We traveled a great deal.

Q. Did Mrs. Penders up to the time of the accident keep house for you? [179] A. Yes.

Q. Did she do all of the cooking at home?

A. Yes.

Q. Did she maintain the household?

A. Yes.

Q. (By The Court): Were there any children of your marriage? A. No children.

(Testimony of Walter L. Penders.)

Q. (By Mr. Halsing): Mr. Penders, owing to the death of Mrs. Penders on April 10, 1949, you incurred certain expenses; is that correct?

A. Yes, very much.

Q. What were the funeral expenses?

A. Well, the funeral expenses amount to about, I do not really have the bills yet, but I believe it is about 1200—anyhow.

Q. You say the funeral expenses amount to $1200?

The Court: About $1200, he said.

Q. (By Mr. Halsing): Do you have a bill for that?

The Court: No. He said he hadn't had one yet.

Mr. Halsing: That is all.

The Court: Was there any expense connected with the car?

Mr. O'Donnell: That will be stipulated to, Your Honor.

Mr. Scholz: I thought you were going to waive it.

Mr. O'Donnell: Well, it was a 1936 Hupmobile so we are not concerned too much.

The Court: There was something in the complaint. [180]

Mr. Halsing: We were mistaken, Your Honor. In drawing the complaint we thought it was much more valuable than it actually was.

Mr. Scholz: What was the value? We will stipulate the value of the automobile is $150.

The Court: Stipulate to that?

(Testimony of Walter L. Penders.)

Mr. Scholz: Yes.

The Court: Cross-examination.

Cross-Examination

By Mr. Scholz:

Q. On your direct examination, Mr. Penders, you stated, as my notes show, that as you drove over the center line, you had your hand out and you were about 100 yards from the intersection when you put your hand out; is that correct?

A. Yes.

Q. Then when you were a hundred yards from the intersection, that is 100 yards before you reached Park Avenue——

A. Before I reached Park Avenue.

Q. Yes. Then, as you put your hand out 100 yards before you reached Park Avenue, you crossed over to the left side of the highway?

A. Yes, left side.

Q. That would be the south side of the highway?

A. Yes. [181]

Q. I notice that as you look at the diagram, you had to put on your glasses. Do you use glasses all the time?

A. No. I had glasses I use for driving only, but my sight is very good.

Q. But you use glasses for driving.

A. I use them for driving, yes. I really don't need them. It is a long story. When I took the examination, of course I couldn't read the lowest line, the few last letters, so they had to put on—told me I would have to get some glasses.

(Testimony of Walter L. Penders.)

Q. Did you have a driver's license at the time of the accident? A. Yes.

Q. Have you got it with you?

A. Yes, I have it with me.

Q. May I see it?

The Court: What is the date of that?

Mr. Scholz: The date of this is—it covers the period December 22nd, 1944 to December 22nd, 1948.

Q. When you got your permit to drive, they suggested that you have driving glasses?

A. Driving glasses, yes. I had them on at the time.

Mr. O'Donnell: The license requires it. It is a restricted license. It is right on the face of the license.

Mr. Scholz: So stipulated.

Mr. O'Donnell: So stipulated.

Q. (By Mr. Scholz): I believe you are 81 years old now? [182] A. What?

Q. You are 81 years old? A. 82.

Q. 82 years old now. A. Yes.

Q. At the time of the accident did you have your glasses on? A. I had them on, yes.

Q. As you approached the intersection of Park Avenue and Fremont and as you had reached the intersection of Auguscito Road what lane were you in at the time you were at that spot?

A. When I made the turn?

Q. I am not asking you whether you made the

(Testimony of Walter L. Penders.)

turn now. I think you already said that as you went east on Fremont Avenue you reached Auguscito Road. A. Yes.

Q. What lane were you in when you reached the intersection of Auguscito Road and Fremont?

A. I was in the inner lane; I turned on the inner lane with my hand out until I got up to the intersection.

Q. You turned on the inner lane; you mean the inner lane of the northbound traffic? A. Yes.

Mr. Halsing: Eastbound.

The Witness: No—the eastbound. I was going east.

G. (By Mr. Scholz): You were going east. That is what I am [183] asking you. You mean the inner lane of the eastbound traffic A. Yes.

Q. Or the inner lane of the westbound traffic?

A. Yes.

Q. Well, which? I asked you two different questions.

A. I was in the inner lane of the eastbound traffic just before I made the turn.

Q. You made the turn just about Auguscito Road?

A. No; I made the turn at Park Avenue.

Q. I mean you crossed over? A. Yes.

Q. You crossed over the double line to Auguscito Road?

A. No; I did not cross the double line until I got to Park Avenue.

(Testimony of Walter L. Penders.)

Q. You told me you crossed over approximately 100 yards before you reached Park Avenue?

A. Not the double line, I did not.

The Court: I understood him to say he crossed into the inner lane, the eastbound traffic, about 100 yards before he reached Park Avenue.

Mr. Scholz: I had in my notes that he crossed the center line about 100 yards. However, I think we will let the record speak for itself. I think I can clarify that later.

The Court: That is what I put down here. I put it down here—— [184]

Mr. Scholz: Would you, Mr. Reporter, read back there? It is about the first few questions I asked.

The Court: He said he drove over that center line with his hand out 100 yards before he reached Park Avenue. I took it to mean the center line of the lanes going east, the inner lane going east. Then he said, the first question you asked him, 100 yards before he reached Park Avenue, he had his hand out and crossed to the left side of the south side of the highway. That is the way I wrote it down.

Mr. Scholz: May we open his deposition, Your Honor, please—Mr. Penders' deposition?

The Court: Yes.

Q. (By Mr. Scholz): Mr. Penders, would you look at your deposition at page 9, line 22. Do you recall the taking of your deposition at Monterey on October 2nd, 1948? A. Yes.

Q. May I ask this question——

(Testimony of Walter L. Penders.)

Mr. O'Donnell: Let him read it first.

Mr. Scholz: Page 9, line 22, right there (handing document to the witness).

Mr. O'Donnell: Have you read that?

The Witness: Yes.

Q. (By Mr. Scholz): Is that a correct statement? A. Yes.

Mr. Scholz: I will read the deposition. [185]

"About how many yards were you from where you told me you turned had you first looked for any automobiles going west on Fremont?

"Answer: Well, all the way down for two or three hundred yards."

Is that a correct statement? A. Yes.

Q. Now, Mr. Penders, on page 12, line 21—I mean page 19, line 22.

Mr. O'Donnell: Where do you want him to read?

Mr. Scholz: From line 21 to line 26. I asked the question:

"Now, Mr. Penders, did you make an arm signal approximately 75 to 100 feet before you reached the intersection of Park Avenue and——

"A. I did, yes.

"Q. At the time you made the arm signal did you turn? "A. Yes."

Is that correct? A. Yes.

Q. Were you living in Pacific Grove for 24 years? A. Yes.

Q. And you are quite familiar with Fremont Street? A. Yes.

(Testimony of Walter L. Penders.)

Q. And Park Avenue? [186] A. Yes.

Q. As you approached Park Avenue and were opposite the intersection of Auguscito Road and Fremont Street, how fast were you going?

A. I was going, I guess about 25 miles; just about that.

Q. At that time I think you testified, you were in the north lane of the eastbound traffic?

A. Yes.

Q. Now, as you continued on from that point I have indicated until the point of the impact, did you maintain your speed of 25 miles an hour?

Mr. O'Donnell: Just a moment. For the purpose of the record——

The Witness: Just about that.

Mr. O'Donnell: ——what point is indicated?

Mr. Scholz: Auguscito Road and Fremont.

The Witness: Just about 25 miles.

Q. And you maintained and continued that to the point of impact? A. Yes.

Q. As you were within 100 feet of the intersection of Park Avenue and Fremont Street—what I mean by the intersection, of course I mean the western curb line of Park Avenue, the extension of the westerly curb; is that clear? A. Yes.

Q. As you came within 100 feet of the intersection of Park Avenue and Fremont Street, what was the position of your automobile?

(Testimony of Walter L. Penders.)

A. What was the position? 100 feet before I came to Park Avenue——

Q. Take your time. We can always read the question back.

(Question read.)

A. The position was facing east, of course.

Q. In what lane?

A. I was in the inner lane, going east, with my hand out.

Q. At that particular time was there any automobile following you?

A. Nothing; nothing at all, except there was a bus way back of me there; the Monterey bus was following our direction.

Q. How far back of you was the bus?

A. I couldn't say; maybe 100 yards; it was coming.

Q. That was when you were about 100 feet from the intersection? A. Yes.

Q. Did you notice the bus after that?

A. No, I did not; no, I didn't notice it at all.

Q. You had somebody sitting up in the front seat with you?

A. Yes; Mr. Edlin.

Q. Did you make a remark to him or to Kate Hunt at the time?

The Court: At what time?

Mr. Scholz: At the time when you were approximately 100 [188] feet from the intersection, that you believed you were near your destination and

(Testimony of Walter L. Penders.)

started to swing to the left? A. No.

Q. Were you talking to anybody in the car prior to the impact? A. No, I was not.

Q. You are positive of that?

A. Yes; I am positive of it.

Q. When do you recall talking to anybody in the car prior to the impact?

A. I did not get that.

(Question read.)

A. That was when we stopped at the restaurant down there where we intended to get our meal, but after we got in, it was only a short distance before we got to Park Avenue; I said, "We will go down to Monterey and get our dinner down there." I told them I knew a place down there where we could get a good meal.

Q. Was that after you left the place?

A. After we left the restaurant there.

Q. It was about three or four hundred yards?

A. Yes.

Q. Before you reached the place of the impact?

A. Yes.

Q. Did you have any other conversation that you recall? A. No. [189]

Q. Miss Kate Hunt say anything to you?

A. No.

Mr. O'Donnell: I submit he has testified there was no other conversation.

The Witness: They were in the back seat.

(Testimony of Walter L. Penders.)

Mr. O'Donnell: He testified there was no conversation.

Mr. Scholz: That is correct, but it is cross-examination.

The Court: Yes. You can ask the same question twice on cross-examination.

Q. (By Mr. Scholz): As you reached the intersection of Auguscito Road and Fremont Street, you didn't see any automobiles coming towards you at all? A. None whatsoever.

Q. Then as you made the turn onto the other side of the highway, across this double line, you didn't see any automobile? A. No.

Q. At the time you made the turn?

A. None at all.

Q. You didn't see any automobiles until just an instant before the impact? A. No.

Q. You mean you did not see any autmobiles?

A. No, I did not. There was none in sight.

Q. Until just the instant before the impact; is that correct? A. No. [190]

Q. Now, I call your attention to your deposition—by the way, you read this deposition over?

A. Yes.

Q. And did you read it over in the presence of your attorney? A. Yes.

Mr. O'Donnell: No, you did not.

Q. (By Mr. Scholz): You made whatever corrections you deemed necessary? A. Yes.

Q. Calling your attention to page 17, line 19,——

Mr. O'Donnell: How far?

(Testimony of Walter L. Penders.)

Mr. Scholz: Down to line 22, inclusive.

"Q. How far was he" —this is referring to the army vehicle driver— "how far was he from you before he struck you?

"A. He must have been 150 yards.

"Q. That is also that distance from you?

"A. Yes.

"Q. When you first saw him? "A. Yes."

Is that correct? A. Yes.

Q. You stated, though, just a few minutes ago that you did not see the car, the army car until just an instant prior to the impact. [191]

A. No. It was only—it seemed like almost a second when I discovered him that he was right on top of me almost; it only seemed like a second. It was coming at such tremendous speed.

Q. Will you come down here, Mr. Penders? Calling your attention to this diagram, you will note the peculiar formaton of the entrance of Park Avenue. A. Yes.

Q. That is, it runs around and the entrance ends at the point indicated here—there is an M-3, indicatng the position of the automobile. Is that right? A. Yes.

Mr. O'Donnell: Just a minute. Is that your definition of the entrance to Park Avenue and Fremont?

Mr. Scholz: I am trying to follow that. I don't know. I will put it this way—the map speaks for itself, but I want to test his recollection.

(Testimony of Walter L. Penders.)

Q. The entrance to Park Avenue extends from the point there—it says the end of the point, north edge of pavement.

A. Yes.

Q. And the curb? A. Quite a curb.

Q. It is quite broad at the mouth?

A. Yes; very wide there. It is wider on the lower side; I think this is supposed to be the dividing line (indicating).

Q. There is a white line painted there. It is much wider on [192] the westerly side.

A. Yes.

Q. You will note there are two red blocks which are marked M-2. A. Yes.

Q. Was that the position of the automobile after the collision?

Mr. O'Donnell: Just a minute, please. There is nothing in the evidence here that this witness knows anything about the position of the automobiles. He was unconscious.

Mr. Scholz: I don't know. Maybe he can tell.

The Court: Well, it is cross-examination, of course. If he doesn't know, he can say so. He has already said he was unconscious after the impact.

Mr. O'Donnell: Yes.

Mr. Scholz: I know, but it is cross-examination.

The Court: All right.

Mr. O'Donnell: The judge overruled my objection.

(Testimony of Walter L. Penders.)

The Witness: I was unconscious. What the position was I don't know.

Q. (By Mr. Scholz) Do you know what the position of the automobiles were after the accident?

A. I saw some prints, some pictures of it taken by the police.

Q. No. I mean of your own knowledge. All I can ask you is what you know yourself.

Do you recall the position of the automobiles after the accident? [193]

A. No, I don't know the positions.

Q. Calling your attention to your depositon you will note that there is attached to this deposition a diagram which is not to scale and after considering these marks on there, you will note there is a little square indicated by a 1 in the center and a little square with a 2 in the center. Calling your attention in connection with that diagram to page 15, line 13, I will just read this:

"I will show you the diagram that we have referred to at the opening of this deposition which I will ask to have marked for identification.

"(Diagram marked Defendant's Exhibit 1 for identification.)

"I will call your attention to a little square marked with the figure 2 inside it and ask if that is the position of your automobile at the moment of impact. "A. Not exactly.

"Q. I am only asking you about No. 2 and you have answered the question. "A. Yes.

(Testimony of Walter L. Penders.)

"Q. Wherein does it differ from that little square marked with a 2 inside of it?

"A. Well, it is different. Of course——

"Mr. O'Donnell: Can you make the diagram where you were when the government automobile hit you?

"A. This is supposed to be an automobile, which is me. [194]

"Q. Yes; this is supposed to be an automobile which is you and that is a square marked with a 2 in the back. "A. Yes.

"Mr. Scholz: Will you mark on there?

"A. It doesn't make any difference. I was up there."

Mr. O'Donnell: "Up here."

The Witness: "Up here when I made the turn."

"Mr. O'Donnell: Yes. Mark there in pencil where you were and put a 'P' in the center of it.

"A. About over there. That is where I was."

Mr. Scholz: There isn't anything marked on the diagram, Your Honor.

The Court: Anyway I understand when he was answering your questions he was talking about the point of impact.

Mr. O'Donnell: That is it. Not the position of the cars after the accident. Does Your Honor want to take a little recess?

The Court: Yes.

(Recess.)

(Testimony of Walter L. Penders.)

Q. (By Mr. Scholz): During the intermission I looked at the diagram again. I refer to D-1 and there is a D-1 marked on the diagram.

The Court: D-1?

Mr. Scholz: Yes, Your Honor. That D-1 marked on that diagram is the position of the government vehicle at the time [195] of the impact.

Q. Have you any knowledge of the position of the vehicles after the impact?

A. Not at all, no.

Q. Now, the front part of the government vehicle struck the front part of your automobile?

A. The front part of it, yes.

Q. Mr. Penders, as you made the arm signal, did you cross the dividing line?

A. Not until after—I had my hand out at the time I crossed.

Q. You put your hand out first before you crossed the dividing line? A. Yes.

Q. How far did you travel from the time you put your hand out until you crossed the dividing line? A. Oh, about 75 yards, I guess.

Q. Then you crossed into the westbound traffic part of Fremont before you reached the intersection of Park Avenue and Fremont Street?

A. Yes.

Q. How far were you from the intersection of Park Avenue and Fremont Street when you crossed the double white line?

A. I don't just quite get that. How far I was

(Testimony of Walter L. Penders.)

on Fremont Street when I passed the double line?

Q. We can read the question back. [196]

(Question read.)

A. The double white line? I wasn't—I crossed opposite—I was not far from it. I crossed the center line; that is, it comes from Park, the middle of the intersection; I didn't cross until I got——

Q. You state now that you crossed the double white line opposite the center white line?

A. Yes.

Q. Is that correct? Do you understand my question?

A. I made the turn—I didn't cross, no, until I got opposite Park Avenue.

Q. But you had crossed over the double white line first before you made your turn?

A. No, no, I didn't cross over. I didn't cross until I got opposite Park Avenue. That is when I crossed the double line, the center line.

Q. Will you indicate approximately where you were when you crossed the double white line?

A. Here is the line, here. I followed along this line here until I got here, opposite from here, but opposite—I crossed here.

Q. Put a mark on the spot.

A. I crossed here.

Q. Put a mark where you crossed the double white line. A. Right here. [197]

Q. About where you crossed the double white

(Testimony of Walter L. Penders.)

line. Here is the double white line. You better put your glasses on, I think.

A. I guess I better. I didn't cross the double white line until I got opposite Park Avenue.

Q. Will you put an X where you crossed the double white line. That is the double white line, yes.

A. Well, it was right here; right there (indicating).

Mr. Scholz: Now I will mark that.

The Court: P-4.

Mr. Scholz: P-4. Will you sit down, Mr. Penders?

Q. P-4 indicates the place where you crossed over the double white line. A. Yes.

Q. Now, Mr. Penders, calling your attention again to your deposition, page 11, line 7,—can Your Honor see this?

The Court: Yes.

Mr. Scholz: Line 7 to line 18, inclusive.

A. I don't know how wide it is, anyhow.

Q. I will ask you—I asked this question.

"Mr. Scholz: How many feet were you positioned with the prolongation of the western line of Park Avenue when first you saw an automobile across the double line?

"A. I guess it must have been, oh, 40 or 50 feet."

40 or 50 feet; is that correct? A. Yes. [198]

Q. "Do you know how wide Park Avenue is where it reaches Fremont Extension?

(Testimony of Walter L. Penders.)

"A. I have no idea how wide it is. It used to be a very narrow street but now they have widened it.

"Q. At the time of the accident, do you know approximately how wide it was?

"A. It must have been 75 feet, I guess."

Is that correct? A. That's right.

Q. I believe you stated you did not see the automobile until an instant before the impact; is that correct?

A. Just a few minutes, a few seconds.

Q. Fremont Street, that is up the hill, quite a grade, isn't there, going east?

A. Going east, yes. This is a grade.

Q. About what per cent grade?

A. About 10 per cent, I judge.

Q. Didn't you state in your deposition that it was, Fremont Extension is about 25 or 39 degree downgrade?

A. Going into Fremont, yes. At the approach it is about that.

Q. I don't quite understand you.

Mr. O'Donnell: Well, he doesn't understand you either.

Q. (By Mr. Scholz): Is there a grade on Fremont Street? A. Yes.

Q. Going east to Park Avenue? [199]

A. Yes, there is.

Q. About what?

A. I judge about 10 per cent maybe not that.

(Testimony of Walter L. Penders.)

It was quite a grade at one time. It has been cut down considerably of late.

Q. I am speaking at the time of the accident. Did you state on page 21 of your deposition that the Fremont Extension is about 25 or 30 degrees downgrade? A. Yes.

Q. Then it starts to level off?

A. Going east?

Q. Going east.

A. It levels after it comes up quite a distance, quite level.

Q. Where does that start?

A. It starts, I imagine, about 200 feet.

Mr. O'Donnell: From where?

A. From Park Avenue.

Q. (By Mr. Scholz): You mean from the east prolongation of the eastern curb of Park Avenue?

A. Yes. That grade was cut down considerably.

Q. I am speaking about the time of the accident, see? A. Yes.

Q. As I understand it, it is about 25 per cent from your deposition, up about a hundred feet.

A. Yes.

Q. After that, 200 feet from the intersection, east intersection, [200] then it levels off.

A. Yes.

Q. Does it start to level off a little bit from Park Avenue, 200 feet east of Park Avenue?

A. It levels—it is about an even grade for about 200 feet; well, I don't know, 100 yards, over 100

(Testimony of Walter L. Penders.)

yards maybe; then it levels off, I don't know just how much there is there, but, anyhow, it starts to level after it goes up about 250 feet there.

The Court: Was it a slight grade from Park Avenue east, a point 200 feet, before it leveled off, or is it 10 per cent?

A. It is 10 per cent; where it comes down, I think maybe about 10 or 11; must be about 15 per cent some places, Your Honor.

The Court: From a point east of Park Avenue up to Park Avenue, as I understand you, it is about a 10 per cent grade? A. Yes.

Q. Then going further towards the west of Park Avenue, I should say west of Park Avenue, yes, up to Park Avenue it is about a 10 per cent grade; is that it?

A. Yes. It runs about the same along there.

Q. Then east of Park Avenue going up for about 200 feet about what grade is there?

A. It starts to level off after it gets up there.

Mr. O'Donnell: The Judge is not asking you that. He wants to know if there is any difference in the grade before you get [201] to Park Avenue going east and after you get to Park Avenue, after you pass Park Avenue and where it levels off, is the grade the same all the way up to where it levels off or does it *offer*?

A. About the same; not much difference.

Mr. Scholz: It would be erroneous. Your Honor will recognize the police officer also testified as to the grade.

(Testimony of Walter L. Penders.)

Mr. O'Donnell: About 10 per cent.

Mr. Scholz: About half that. 20 per cent, he says.

Mr. O'Donnell: Yes; he said 25 per cent in his deposition.

Mr. Scholz: No. The police officer said 20 per cent.

The Court: Which officer was that?

Mr. Scholz: The officer, Lt. Marinello.

Mr. O'Donnell: That is all.

Mr. Scholz: At this time we would like to offer the deposition of Mr. Penders in evidence as Defendant's exhibit next in order.

The Clerk: That will be Defendant's Exhibit E in evidence.

(The deposition of the plaintiff Walter Penders was marked Defendant's Exhibit E in evidence.)

DEFENDANTS' EXHIBIT E

In the Southern Division of the United States District Court for the Northern District of California

No. 27202-H

WALTER L. PENDERS and
FLORA PENDERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST DOE and SECOND DOE,

Defendants.

DEPOSITION OF WALTER L. PENDERS

October 2, 1948

Appearances:

For the Plaintiffs,

EUGENE O'DONNELL, ESQ.,
Attorney at Law,
785 Market Street,
San Francisco, California.

For Defendant, United States of America,

FRANK J. HENNESSY, ESQ.,
United States Attorney,
U. S. Post Office Building,
San Francisco, California,

RUDOLPH J. SCHOLZ, ESQ.,
Assistant United States Attorney, appearing.

Defendants' Exhibit E—(Continued)

Be It Remembered, that pursuant to written stipulation between Counsel for the respective parties hereto, on the 2nd day of October, 1948, at the hour of 11 o'clock, a.m., in the office of Gordon Campbell, Esq., Attorney at Law, Professional Building, Monterey, California, before me, Charles P. McHarry, a Notary Public in and for the County of Monterey, State of California, duly appointed, commissioned and sworn to act as such Notary Public in the State of California and residing therein, appeared

Walter L. Penders

one of the plaintiffs in the above-entitled action, produced as a witness on the part of defendant, United States of America, who, after being by me sworn to tell the truth, the whole truth and nothing but the truth, was interrogated and testified as will by said deposition be shown.

That at the taking of said deposition, plaintiffs were represented by Eugene O'Donnell, Esq., Attorney at Law, 785 Market Street, San Francisco, California, and defendant, United States of America, was represented by Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco, Rudolph J. Scholz, Esq., Assistant United States Attorney, appearing.

It Was Stipulated by Counsel that the Notary, after swearing the witness, might retire.

Defendants' Exhibit E—(Continued)

It Was Further Stipulated that all objections, save as to the form of the question, be reserved until the time of trial.

It Was Further Stipulated that if said deposition be not signed within ten days after notice of completion to the witness, it may be returned to the Clerk of the Court and offered in evidence, the same as if signed.

WALTER L. PENDERS

being first duly sworn, testified as follows:

Direct Examination

By Mr. Scholz:

Q. What is your name?

A. Walter Leonard Penders.

Q. What is your address?

A. 208 Alder Street, Pacific Grove.

Q. How long have you lived in Pacific Grove?

A. Twenty-three years.

Q. The past twenty-three years? A. Yes.

Q. How old are you, Mr. Penders?

A. How old do you think I am?

Q. How old are you?

A. Well, that will not make any difference.

Q. (By Mr. O'Donnell): What is your age?

A. What do you think?

Q. Well, I am asking you?

A. Well, I will be eighty-two the 19th of January.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. Scholz): Mr. Penders, do you wear glasses?

A. I did all the time. I wore them at the time of the accident. I have not had them since but my eyes have been good. I could see fine but I had my glasses on. I only have worn glasses for reading.

Q. Do you recall an accident that happened about 6:40 p.m. on the 11th of May, 1946? A. Yes.

Mr. O'Donnell: Are you going to use this diagram for the purpose of examining the witness?

Mr. Scholz: Yes.

Mr. O'Donnell: This will be perfectly okay to go into evidence with the understanding, of course, that the marks appearing upon the face of the diagram noted "skid marks" and another line running to a parallelogram noted "2" is not a part of the record.

Mr. Scholz: That's right. Let's exclude everything on there except the markings of the four roads.

Mr. O'Donnell: That will be all right.

Mr. Scholz: And the width, subject to any corrections you want to make, and all other marks, positions of vehicles, or any other marks are out as far as this deposition is concerned.

Mr. O'Donnell: I also understand that the diagram which you have in your hand is not drawn to any particular scale?

Mr. Scholz: I believe that is correct.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. About that time you were driving your automobile? A. About that time, yes.

Q. Where were you driving your automobile?

A. I was driving it out Fremont.

Q. That is in Monterey——

A. Monterey——

Q. ——California? A. Yes.

Q. What kind of automobile were you driving?

A. I was driving a Hupmobile.

Q. What model? A. 1934.

Q. Was it in good condition?

A. Good condition, yes.

Q. When did you have it last examined by an automobile mechanic?

A. A short time before.

Q. How long prior to the accident?

A. Two, three months.

Q. What mechanic did you have examine it?

A. Monterey Garage.

Q. Did he find anything wrong with it?

A. Nothing wrong at all.

Q. You were driving——?

Mr. O'Donnell: Fremont Road runs east and west?

Q. (By Mr. Scholz): It's Fremont Extension?

A. Yes.

Q. That runs generally east and west?

A. Yes.

Q. And then, at Park Avenue it slants off to

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

the north? A. To the north, yes.

Q. (By Mr. O'Donnell): It makes a dog-leg, is that correct?

The Witness: Yes.

Q. (By Mr. Scholz): How wide is Fremont Extension?

A. It's a four-lane width, four lanes and it's oh, I judge 75 or 80 feet. Maybe a little more than that.

Q. Are the east bound and west bound lanes on Fremont Extension divided by a lane?

A. Yes, there's four lanes there.

Q. Two lanes going east and two lanes going west? A. Yes, there's a dividing line.

Q. Park Avenue runs north off Fremont Extension? A. Yes.

Q. Aguajito Road runs generally south off Fremont Extension, is that correct? A. Yes.

Q. Now, you were driving in a generally easterly direction on Fremont Extension?

A. Fremont Extension.

Q. And as you approached the intersection of Fremont Extension and Park Avenue and approximately 100 yards west of that intersection, where were you driving?

A. I was driving east on Fremont.

Q. (By Mr. O'Donnell): In what lane?

A. I was driving—I drove up—I was on the second lane.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. Scholz): That's the inside lane?

A. Inside lane——

Q. (By Mr. O'Donnell): For the purpose of the record, what do you term the "inside lane," the one next the double line or the one outside?

The Witness: Next to the double line.

Mr. Scholz: Next to the double line, okay.

Q. At about what speed were you going then?

A. I was going about twelve or fifteen miles per hour, not over that.

Q. As you approached within fifty yards of the intersection of Park Avenue and Fremont Extension what part of the road were you driving on then?

A. I was driving on the second, next to the inner line.

Q. You were driving on the inner lane?

A. Yes.

Q. Next to the double line? A. Yes.

Q. How fast were you going then?

A. Fifteen miles an hour, maybe not that.

Q. As you approached within 25 yards of that same intersection were you in the same position and driving at the same speed as heretofore?

A. Yes, just the same.

Q. Did you make a turn over into—across the double line and into the westbound traffic?

A. Not until I was opposite this Park Street.

Q. You made the turn into the westbound traffic lane? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. When you were opposite Park Street?

A. Yes.

Q. Park Avenue? A. That's right.

Q. Were you within the boundary lines of Park Avenue, if it had been extended straight across Fremont Extension when you made this turn?

A. Yes.

Q. Now, at the time you made this turn were you going to go up Park Avenue?

A. Yes, I was opposite Park Avenue when I made the turn.

Q. That does not quite answer my question.

Q. (By Mr. O'Donnell): Were you going to go up over Park Avenue?

A. Yes, I was going to go over Park Avenue.

Q. (By Mr. Scholz): You were going up Park Avenue? A. Park Avenue.

Q. When you made your turn, how fast were you driving?

A. Well, I could not have been driving more than ten miles an hour, making that turn, uphill, especially.

Q. Fremont Extension, as you approach Park Avenue, is uphill, is it not? A. Uphill.

Q. About how many degrees?

A. I guess it's about twenty-five, thirty degrees.

Q. In other words, it has about a rise of twenty-five or thirty feet within each 100 feet?

A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. As you approached Park Avenue could you see any vehicle going west on Fremont Extension?

A. None whatever.

Q. Now, you could not see any vehicle up to the time you made the turn?

A. No, nothing in sight.

Q. At the time you made the turn to go up Park Avenue could you see any vehicles?

A. No. Oh, I could see quite a distance ahead if there had been any.

Q. You could see quite a distance ahead?

A. Yes.

Q. But you did not see any vehicles?

A. None whatever.

Q. Did you look ahead, that is, east on Fremont Extension, as you made the turn, to see if there were any vehicles coming? A. Oh, sure.

Q. And you did not see any vehicles?

A. None whatever.

Q. How far east on Fremont Extension could you see at the time—just before you started to make your turn to go up Park Avenue?

A. I could see, I guess, 250 feet—250 to 275—all of 275.

Q. All of 275? A. Yes.

Q. There were no vehicles at all going west on Fremont Extension just before you made the turn?

A. None whatever.

Q. As you were in the midst of making your

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

turn to go up Park Avenue, did you see any vehicle going west on Fremont Extension?

A. None whatever, no.

Q. As you completed your turn did you see any vehicles going west on Fremont Extension?

A. No.

Q. Did you look to see if there was any vehicle coming? A. Sure, I did.

Q. You are positive of that?

A. I am positive of that.

Q. When did you first look to see if there were any vehicles coming or going west on Fremont Extension? A. Before I made the turn.

Q. About how many yards were you from where you first made your turn that you first looked for any automobiles going west on Fremont Extension?

A. Well, all the way down, for two or three hundred yards.

Q. And did you continuously look to see if any vehicles were coming or going west on Fremont Extension after you completed your turn?

A. Sure, I did.

Q. Now, was there any vehicle ahead of you as you went east on Fremont Extension?

A. No.

Q. Were there any vehicles on that road at all that you saw? A. Not going east.

Q. That you saw? A. No.

Q. Now, how many feet were you east of the prolongation of the western line of Park Avenue when

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

the front part of your automobile crossed the double line?

A. Oh, I guess I was—well, almost across the highway.

Q. I don't think you quite understood the question. Will you read the question, Mrs. White?

(Question read by reporter.)

Mr. O'Donnell: I object to that on the ground that the witness has testified he did not start to make the turn until he was opposite Park Avenue.

Mr. Scholz: That's right.

Q. Now, how many feet were you—will you read the question again?

(Question read by reporter.)

Mr. O'Donnell: Oh, yes, I see. I am sorry.

The Witness: I don't quite understand that question now. I got an awful knock on the head and I cannot understand as I used to.

Mr. Scholz: The reporter will read the question again.

(Question read by reporter.)

The Witness: I did not go over it until I got opposite there.

Mr. Scholz: Read the question again.

(Question read by reporter.)

Mr. Scholz: How many feet were you east of the prolongation of the western line of Park Ave-

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

nue, when the front part of your automobile crossed the double line?

A. I guess it must have been oh, forty, fifty feet, I guess, forty or fifty feet.

Q. Do you know how wide Park Avenue is where it reaches Fremont Extension?

A. I have no idea how wide it is. It used to be a very narrow street but now they have widened it.

Q. At the time of the accident do you know approximately how wide it was?

A. It must have been seventy-five, I guess.

Q. Now, did you see the Government vehicle which is the subject of this suit, at any time prior to the collision?

A. No, not at all. Let me tell you now, can I——

Mr. O'Donnell: Just answer "yes" or "no." Did you see it? A. No.

Q. (By Mr. Scholz): Have you any explanation?

A. I would like to explain about what I saw——

Mr. Scholz: Just on this question. I cannot take everything at one time. You say you did not see it. You may explain it. If you do not want to explain it, let your answer stand.

A. I did not see it at the time I made the turn.

Q. And I believe you stated that you did not see it at or prior to the impact?

A. No, not at all.

Q. You did not see it at all?

A. No. Well, let's see, I did.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. When did you first see the Government vehicle?

A. I saw it when I was half off the highway and I—do you want any more?

Q. Well, that's all right. What do you mean by that, when you were half off the highway?

A. I mean I was almost off on the south line, the Fremont south line, I mean north line. I was almost off the highway.

Q. As I understand it, you mean the north curb line of Fremont Extension—you were almost off the north line of Fremont Extension when you first saw the vehicle? A. Yes, surely.

Q. What was the position at that time in reference to Park Avenue?

A. Well, it was not more than four feet from being off the highway.

Q. I don't quite understand that. You had better explain it.

A. I was almost off the highway when the vehicle struck me.

Q. In other words, I think you mean that you were almost in Park Avenue—— A. Yes.

Q. ——when the vehicle struck you?

A. Yes. They show that with photographs they have taken.

Q. Now, what was the position of your vehicle when you first saw the Government vehicle, with reference to Park Avenue? In other words, was it

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

on the west side of Park Avenue or on the east side?

A. It was on the north side—I do not quite understand—you mean Fremont Street, don't you?

Q. I believe you stated the biggest part of your automobile was in Park Avenue when you first saw the Government vehicle? A. Yes.

Q. I want to know were you on the east side of Park Avenue when you first saw the Government vehicle or were you on the west side of Park Avenue when you first saw the Government vehicle?

A. I was out on the east side. I was on the east side.

Q. East side? A. Yes.

Q. Were you at the southwest corner of Park Avenue where it enters into the intersection of Fremont Extension when you first saw the Government vehicle?

A. Yes, I was at the southwest——

Q. Were you in——

A. No, no, that's wrong. I was off the highway almost when I saw it.

Q. You say you were off the highway—you mean you were off that strip between Park Avenue and Fremont Extension? A. Yes.

Q. Now, what was the position of your automobile at the moment of impact?

A. The position—was almost off the highway. Almost off the highway.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Was it in a different position than when you first saw the Government vehicle?

A. No, it was almost off the highway. I will explain if you want me to explain.

Q. All right.

A. I was almost off the highway and I looked up and saw this automobile going and it was going like this—(demonstrating with hand) backwards and forwards and backwards——

Q. That doesn't mean a thing to the reporter——

A. ——it was going backwards——

Q. Just a minute, when you go like that with your hands, that doesn't mean a thing to the reporter——

A. ——and I saw that he had lost control of it and I thought he would go behind me——

Mr. Scholz: I move that that go out, "I thought he would go behind me."

Mr. O'Donnell: You cannot say what you thought. Just tell what you saw.

Q. (By Mr. Scholz): All right——

A. This is what I saw.

Mr. Scholz: ——tell us what you saw, not what you thought.

A. Well, I saw it coming and I see that there was no way of getting out of it and I thought—oh, well, he hit me and I thought he was going in back of me and then I started ahead and in a minute he hit the front end of the car. That's all I remember. I was knocked out completely.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Now, at the moment of impact, then, your automobile was between that little corner on the west side of Park Avenue and the north side of Fremont Avenue? A. Yes.

Q. I will show you this diagram that we have referred to at the opening of this deposition, which I will ask that you mark for identification.

(Diagram marked "Defendant's Exhibit for Identification No. 1" by Reporter.)

and call your attention to a little square marked with the figure "2" inside of it and ask if that is the position of your automobile at the moment of impact? A. Not exactly.

Q. I am only asking you about No. 2 and you have answered the question? A. Yes.

Q. Wherein does it differ from that little square marked with the "2" inside it?

A. Well, it's different. Of course——

Q. (By Mr. O'Donnell): Can you mark on the diagram where you were when the Government vehicle hit you?

A. This is supposed to be an automobile, which is me?

Q. Yes. This is supposed to be the automobile "which is me"—that is a square marked with the figure "2" in the center? A. Yes.

Q. (By Mr. Scholz): Will you mark on there—

A. It does not make any difference. I was up here (indicating) when I made the turn.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. O'Donnell): You mark there in pencil where you were and put "P" in the middle of it? A. Up there. There's where I was.

Q. (By Mr. Scholz): You have marked on Exhibit 1 for Identification a small pencil square and I will move that out and mark that "D1" in pencil?

A. Yes.

Q. Now, I call your attention to the little square marked in it the figure "1"—in the center and ask you if that was the position of the Government vehicle at the time of the impact?

A. Yes, that was it.

Q. That's the position of the Government vehicle? A. The Government vehicle.

Q. (By Mr. O'Donnell): At the time it hit you?

A. Yes, I was almost off the highway.

Q. (By Mr. Scholz): Who was riding in the front seat with you?

A. Somebody by the name of Edlin, David E.

Q. Does he reside here?

A. No, he doesn't.

Q. Where does he live?

A. He lived in Oakland. He came down on a visit and he was killed.

Q. Who was riding in the rear seat, if anyone?

A. My wife and his sister, Mrs. Hunt.

Q. Now, do you know how fast the Government vehicle was going just prior to the impact?

A. It must have been going 75 or 80 miles an

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

hour or he would have had control of it.

Mr. Scholz: "Or he would have had control of it," I move be stricken out.

Mr. O'Donnell: It may go out.

Q. (By Mr. Scholz): Didn't you just tell me, Mr. Penders, that you just saw it just about the time of the impact? A. Yes.

Q. Then upon what do you base you statement that it must have been going 75 miles an hour?

A. Well, from the distance he was at the time he hit me.

Q. How far was he from you before he struck you? A. He must have been 150 yards.

Q. That is, he was that distance from you——?

A. Yes.

Q. ——when you first saw him? A. Yes.

Q. That that time that you first saw him, where was your automobile?

A. My automobile was partly off the highway, about half way.

Q. Now, Mr. Penders, isn't it a fact that you crossed the double line into the westbound traffic approximately 75 feet before reaching the intersection of Park Avenue and Fremont Extension?

A. I did not.

Q. About 75 feet west of the intersection of Park Avenue and Fremont Extension were you not talking to the people who were in your car?

A. No.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Were you talking to the people in your car at any time prior to your arriving within 100 feet of the intersection of Park Avenue and Fremont Extension?

A. No, not that I remember.

Q. Mr. Penders, are you insured——?

Mr. O'Donnell: Don't answer that question.

(Discussion between Counsel.)

Q. (By Mr. Scholz): You may answer that question, subject to the objection of Counsel?

A. In one way. I will explain what kind of insurance I carry.

Q. Was your automobile insured against any damage to it? A. No.

Q. Were you insured against any injuries you suffered in this matter? A. No.

Q. Now, Mr. Penders, what part of the Government vehicle struck what part of your vehicle?

A. The front part.

Q. The front part of the Government vehicle struck the front part of your vehicle?

A. Yes.

Q. Do you mean by that the front fenders——?

A. Struck the wheel and the fenders and the motor——

Q. Was it a head-on collision?

A. No, it was the side.

Q. The Government hit either the left or front side of your vehicle? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Which side?

A. Struck the east side crossing into Park.

Q. I am asking you—the front part of your vehicle was struck? A. Yes.

Q. What part was it—sitting in the driver's seat, was it the right front part, the left front part or directly head-on?

A. Right front side.

Q. What front part of the Government vehicle struck your right front part?

A. Struck head on, straight.

Q. The vehicles struck head-on?

A. Head-on, yes.

Q. Now, Mr. Penders, did you make an arm signal approximately 75 to 100 feet before you reached the intersection of Park Avenue and——?

A. I did, yes.

Q. At the time you made the arm signal, did you turn? A. Yes.

Q. Now, did the Government vehicle driver apply his brakes at any time, if you know?

Q. (By Mr. O'Donnell): If you know?

A. No.

Q. (By Mr. Scholz): You do not know if he did or not? A. No.

Q. Were you watching him as he approached?

A. Yes.

Q. As far as you know, he slackened speed?

A. He must have slackened speed because his car

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

was going from one side to the other—he evidently lost his control of it——

Mr. Scholz: Object to his statement, "he evidently lost his control of it"——

Mr. Donnell: Yes.

Mr. Scholz: ——and it may go out by stipulation.

The Witness: You want the direct questions, I see that.

Mr. Scholz: In your words then, he slackened speed?

A. He slackened speed.

Q. How much speed did he slacken say, within 100 feet of the intersection?

A. He did not seem to slacken any. He seemed to have lost control.

Mr. Scholz: I move that "he seemed to have lost control" be stricken out.

Mr. O'Donnell: Stipulated.

Q. (By Mr. Scholz): Within 25 feet of the moment of impact was his vehicle slowing up?

A. I could not see any difference.

Q. You could not see any difference: Now, Fremont Extension up to the intersection of Park Avenue and Fremont Extension is practically level?

A. No, it's hilly, going up.

Q. Going west on Fremont Extension, up to Park Avenue, is that level or is that downgrade or upgrade? A. It's downgrade.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Then Fremont Extension from Park Avenue going west, is that downgrade also?

A. Downgrade.

Q. Is it more of a downgrade there?

A. Just about the same.

Q. In other words, the whole Fremont Extension is about 25 or 30 degrees downgrade?

A. Yes.

Q. All along there? A. Yes.

Q. Prior to reaching Park Avenue and after passing Park Avenue? A. Yes.

Q. Is the automobile you were driving a green sedan? A. Yes.

Q. Where had you come from prior to the collision? A. Came from home.

Q. Pacific Grove?

A. Yes, Pacific Grove.

Q. You went to Monterey and then went out Fremont Extension? A. Yes.

Q. Where were you going to go?

A. Going out to dinner.

Q. Where? A. Monterey.

Q. Monterey? A. Monterey, yes.

Q. Any particular place in Monterey?

A. Yes.

Q. What was the name of the place?

A. Fremont Avenue. I don't know the name. It's about three or four one hundred yards this side of where the accident was. We stopped there.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

intending to have our meal there but the place was closed so we went on farther.

Q. Were you looking for a place to dine?

A. Yes.

Q. Just prior to that? A. Yes.

Q. Were you just going up Park Avenue to go to a place to dine?

A. We were going up Park Avenue to make the turn and then coming back to Monterey

Q. You were going to make the turn to come back to Monterey? A. Yes.

Q. In other words, you did not intend to proceed north on Park Avenue but turn around and go back west on Fremont Extension?

A. No, we did not expect to go on Fremont. We expected to turn off to Park and go to the next street that runs east and west and go back to Monterey.

Q. What street is that?

A. Franklin, I think it is.

Q. Is Franklin east or west of the intersection of Park Avenue and Fremont Extension?

A. It runs away out past Del Monte, I think, quite a distance.

Q. (By Mr. O'Donnell): You have not answered the question: does it run the same as Fremont?

A. It runs the same as Fremont, east and west.

Q. (By Mr. Scholz): It runs the same as Fremont, east and west? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. But is it south of Fremont Extension?

A. No, it's north.

Q. North of Fremont Extension?

A. Yes.

Q. In other words, you intended going up Park Avenue and then turn and then go back to Monterey? A. Go west.

Q. Go west to Monterey? A. Yes.

Q. Did you talk to the police at the time of the accident, Mr. Penders?

A. No, I was unconscious. I did not know anything.

Q. You did not know what happened after the accident?

A. No, nothing after the accident.

Q. You do not know the position of your car immediately after the accident?

A. No, only through photographs I have seen of it.

Q. But not of your own knowledge?

A. No.

Q. In other words, after the impact you had no knowledge of what happened for the rest of that day? A. No, not at all.

Q. You are sure, are you, that you did not see any cars coming west on Fremont Street before the impact? A. Yes.

Q. And you are also sure there were no cars

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

going east on Fremont Street, as far as you know, prior to the impact? A. No.

Q. And there were no cars ahead of you going east on Fremont Street? A. No.

Mr. Scholz: I guess that's all.

Mr. O'Donnell: I have no questions.

(Witness excused.)

/s/ WALTER LEONARD PENDERS.

State of California,
County of Monterey—ss.

I, Charles P. McHarry, a Notary Public in and for the County of Monterey, State of California, residing therein, duly commissioned, sworn and authorized to administer oaths, Do Hereby Certify, that the foregoing is the deposition of Walter L. Penders, one of the plaintiffs in the foregoing entitled action; that said witness, before the taking of his testimony, was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was taken in the offices of Gordon Campbell, Esq., Professional Building, Monterey, California, on the 2nd day of October, 1948, at the hour of 11 o'clock, a.m., and was taken down in shorthand by Olive Calvert White, a competent shorthand reporter and thereafter, by her transcribed into typewriting; that said deposition was thereafter read by said witness and after being

Defendants' Exhibit E—(Continued)

correct in every particular desired by him, it was thereupon subscribed in my presence by said witness.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office this 14th day of October, 1948, at Monterey, California.

[Seal] /s/ CHARLES P. McHARRY,
Notary Public in and for the County of Monterey, State of California.

[Title of District Court and Cause.]

STIPULATION FOR TAKING THE DEPOSITION OF PLAINTIFF WALTER L. PENDERS

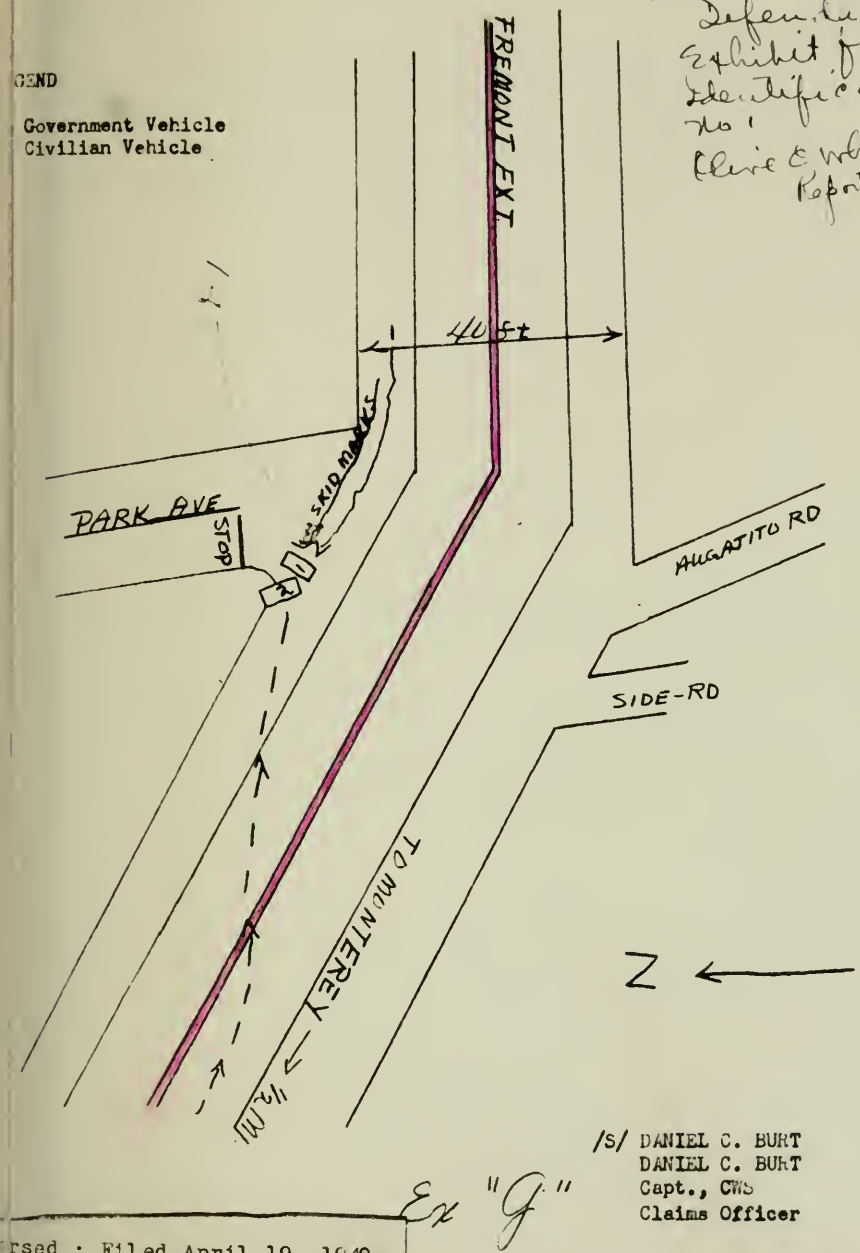
It Is Hereby Stipulated that the deposition of Walter L. Penders will be taken in the office of Gordon Campbell, Professional Building, Monterey, California, on the 2nd day of October, 1948, commencing at the hour of 11:00 a.m., and that it may continue until completed, and that same may be taken under Rule 26(d-2) and (f) of the Federal Rules of Civil Procedure.

Dated: September 11th, 1948.

EUGENE H. O'DONNELL,
Attorney for Plaintiff.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant United States of America.

October 2, 194
Defendants
Exhibit for
Identification
No. 1
Clerk & White
Reporter



/S/ DANIEL C. BURT
DANIEL C. BURT
Capt., CWS
Claims Officer

Ex "G"

rsed : Filed April 19, 1949.

Mr. O'Donnell: That is our case, Your Honor. We rest.

Mr. Scholz: If Your Honor please, it is stipulated relative to the cross-complaint that the damage to the government vehicle was $326.91, and that is the reasonable cost of repairs [202] to same.

CARL B. WANLESS

called on behalf of the defendant; sworn.

Direct Examination

By Mr. Scholz:

Q. Mr. Wanless, calling your attention to May 11, 1946, were you in the armed services?

A. Yes, I was.

Q. Will you state your name, rank and station?

A. Private, serial number 39496414, stationed at Fort Ord, California.

Q. What was your duty on May 11, 1946?

A. I was on town patrol with the military police.

Q. Were you driving an automobile?

A. Yes, I was.

Q. That afternoon? A. Yes.

Q. What kind of an automobile was it?

A. It was a Chevrolet Suburban carryall.

Q. Was it a half ton? A. Yes.

Q. Are they slightly top heavy?

A. Yes; they are slightly top heavy.

Q. Were you involved in an accident about 6:40 p.m. on that day? A. Yes. [203]

Q. Where were you driving?

A. I was driving into the town of Monterey from the Del Rey theater.

(Testimony of Carl B. Wanless.)

Q. What were you doing driving there?

A. Well, we had been out to the Del Rey theater checking to see if there was any disturbance or anything and we were going back into town to our usual patrolling.

Q. It was routine duty? A. Yes.

Q. Did you have to be at any place at any particular time? A. No.

Q. Calling your attention to this diagram, I showed it to you a few minutes ago—are you familiar with the scale of the diagram?

A. Yes.

Q. You know in this particular diagram one inch equals 20 feet. As you drove west on Fremont Street, state to the Court what, if anything, happened.

A. As I drove west on Fremont Street, I came over the slight hill there and I noticed this other car just crossing the center line into my line of traffic; I would say he was, oh, at least 150 feet, or maybe 175, and he kept coming over at an angle into my lane, so I cut over further towards the outside lane, and I noticed that he still kept coming over at an angle, so I went as close to the curb as I dared and we hit head on [204] there.

Q. About how fast were you going at the time you first saw the other automobile?

A. I would say around 35 or 40 miles per hour.

Q. How do you know that?

A. Well, I know I was doing at least 35 and just a little over, I would say.

(Testimony of Carl B. Wanless.)

Q. How do you know that?

A. I checked the speedometer; I looked at it every once in a while and I had looked at it not too far back and I was doing 30.

Q. Did they have any speed regulations at Fort Ord at the time?

A. 35 miles an hour is supposed to be the limit for government automobiles.

Q. When you saw this other vehicle that you collided with, did you put on your brakes?

A. Yes, I did.

Q. Could you state about how far you put your brakes on?

A. Well, I started slowing down just as soon as I noticed him over in my lane; I put them on all the way until we hit.

Q. Will you come down here to the board. I will give you a red pencil. This is according to scale. Have you a ruler?

Mr. O'Donnell: The Clerk has one.

Q. (By Mr. Scholz): Will you state how far you were, approximately, [205] from Park Avenue when you first saw the Penders car? Was it a green sedan, do you recall?

A. I don't recall the color. It was a sedan.

Q. About how far from the intersection were you when you first saw his car?

A. Oh, I would say about 80 feet.

Q. When you say 80 feet, do you mean from the curbline or the center of the street?

(Testimony of Carl B. Wanless.)

A. From the center of the street.

Q. Will you indicate, according to the scale there, about the position of your car and also the lane that your car was in when you first saw him? This is when you first saw—we will call it Mr. Penders' car. Mark that W-1.

Now, will you indicate the lane and the distance from your car that Mr. Penders' car was when you first saw it; draw it to scale there; also the lane. I will mark that W-2. Here is the position of his car when he first saw the Penders car and here is the position of Penders' car at the time.

The Court: On the double line?

Mr. Scholz: Yes; just a little bit more over to the left, almost in the center of the double line.

Q. You stated when you saw his car you stepped on the brakes? A. Yes.

Q. Of course, you slowed down? A. Yes.

Q. Then the route of Mr. Penders' car was—will you indicate with a dotted line as near as you recall the position that Mr. Penders' car took up to the point of impact?

The Court: Will you indicate that on the map?

Mr. Scholz: Yes. Here is Mr. Penders' car and here is the dotted line, here. Now, will you indicate on there the position of Mr. Penders' car at the time of the impact between your car and his car?

Now, I will mark that W-3.

Will you indicate on there the position of your car at the moment of impact with Mr. Penders' car?

(Testimony of Carl B. Wanless.)

I will mark that W-4.

Now, will you sit down again, Mr. Wanless.

After the impact, was either car moved any distance?

A. I couldn't tell for sure. They were spun around, but I couldn't tell whether they were moved any distance or not.

Mr. Scholz: I think that is all. Well, may I ask one more question.

Q. You are out of the service now?

A. Yes.

Q. What is your occupation now?

A. I am attending a college right now.

Q. Where? A. Clark College.

The Court: How old are you? [207]

A. 22.

The Court: Then you were 19 at the time of the accident?

A. Yes, I was.

Cross-Examination

By Mr. O'Donnell:

Q. How long had you been stationed at Fort Ord prior to May 11, 1946?

A. About four months.

Q. Four months? A. Yes.

Q. How long prior to May 11, 1946, were you attached to this particular assignment of driving this military patrol automobile?

A. The four months.

(Testimony of Carl B. Wanless.)

Q. During that four months' period you drove over Fremont Extension quite often?

A. Well, not quite often, but I did drive over it, you might say, often.

Q. Approximately how many times a day would you say you passed the intersection of Park Avenue and Fremont? A. I would say once.

Q. Once a day? A. Yes.

Q. For a period of four months?

A. Well, we only had duty four or five days a week up here.

Q. But every day you were on duty you passed there at least [208] once a day; is that correct?

A. Not every day.

Q. However, as a result of your driving this vehicle, you became familiar with the contour of the highway in the vicinity of Park Avenue and Fremont; is that not correct? A. Yes.

Q. And you knew there was an intersection there, you knew the location where Park Avenue came into Fremont Extension?

A. Not too sure, no; I didn't know exactly where it was.

Q. Well, did you know on May 11th, from your previous experience in driving that automobile, that there was a grade which started west of Park Avenue and ended easterly with regard to Park Avenue?

A. Yes.

Q. Did you know from your experience of driving over that terrain, along that highway, that one traveling west, such as you were on this particular

(Testimony of Carl B. Wanless.)

day, would have difficulty because of the contour of the land, the construction of the highway, of seeing cars which were traveling in the same direction, west on Park Avenue?

A. I hadn't noticed it particularly before.

Q. You hadn't noticed it particular before?

A. No.

Q. In your driving had you ever noticed how far when one was approximately 100, 200 feet east of the Park Avenue, how far [209] he could see west of Park Avenue along Fremont Extension?

A. I hadn't noticed. We didn't always drive; we changed around. Whoever happened to be assigned as the driver for that day. I perhaps drove maybe one-quarter of the time I went by there.

Q. However, the fact still remains that you were familiar with this particular intersection?

A. Yes.

Q. Do I understand that you never took particular note whether driving or whether riding as a passenger, as to the contour and the layout of this particular highway around that Fremont Extension?

A. Well, it never seemed to me that there were any particular blind spots there.

Q. Do you know how many lanes are in that particular road? A. Yes.

Q. How many? A. Four.

Q. And on each side is there a shoulder?

A. Yes.

(Testimony of Carl B. Wanless.)

Q. Have you any idea of how wide the shoulders are? A. No, I don't.

Q. You don't. You are familiar with the grade, the downgrade that starts immediately west of the easterly curbline of Park Avenue, are you not?

A. Yes.

Q. What percentage grade would you say that was, to the best of your recollection, as you remember?

A. I would say 10 to 12 per cent.

Q. Ten to twelve per cent. I don't know whether I asked you this or not: One traveling, such as you were on this particular day, that is, the day of the accident, could see people traveling in front of you, that is, people traveling in the same direction as you all along Fremont Street in the vicinity of Park?

A. I didn't notice any particularly ahead of me; there were behind me.

Q. I am just talking now; you are driving an automobile; let's put you back here, W-1, that indicates, my recollection is that that was your position when you first observed the Penders car.

A. Correct.

Q. From the position you have marked W-1, can you tell us approximately how far you could see on Fremont Street in an easterly direction ahead of you?

A. I would say 200 yards.

Q. 200 yards? A. Yes.

(Testimony of Carl B. Wanless.)

Q. That would be 600 feet? A. Yes. [211]

Q. It was at this position marked W-1 that you first observed Mr. Penders' automobile?

A. Correct.

Q. And the Penders automobile at that time was in the position you have marked W-2; is that correct? A. That is correct.

Q. And you say that position, W-1, is approximately 80 feet from the center protruding line of Park Avenue? A. Yes.

Q. After this accident and prior to coming to court today, did you ever discuss this case with anyone?

A. I was shown the statements and photographs taken at the time.

Q. Did you discuss this particular accident with the police officers?

A. Yes, at the time of the accident.

Q. Was that at the time of the accident or subsequent to the accident?

A. Well, within an hour after.

Q. Within an hour of the accident. Where did that discussion take place?

A. In Monterey Hospital.

Q. Who was present?

A. Just the police officer and myself.

Q. Do you know who that police officer was, by name? [212] A. No, I do not.

Q. At that time you gave the police officer a statement; is that correct? A. Yes.

(Testimony of Carl B. Wanless.)

Q. Have you got that statement? Was that in writing?

A. He just filled it out on a form, I believe, a standard form at the time.

Mr. O'Donnell: Have you got that statement, Mr. Scholz?

Mr. Scholz: Not if he gave it to him. Did you make a duplicate of that and turn it in to the CMP? A. No.

Mr. Scholz: I mean the statement that you gave to the police officer. A. No.

Mr. O'Donnell: Other than the conversation that you had in the Monterey Hospital, did you have any other conversation subsequent to that with any members of the Monterey Police Department?

A. No.

Q. You did not? A. No.

Q. In what lane were you traveling when you first observed the Penders' automobile?

A. I was in the outside lane.

Q. In the outside lane? [213]

A. Yes; perhaps in the inner side of the outside lane.

Q. The inner side of the outside lane. In other words, you were traveling close to the shoulder of the road?

A. No. I was traveling closer to the center part of the outside lane.

Q. You were traveling on the dividing lane?

A. No. I was right close to it.

(Testimony of Carl B. Wanless.)

Q. Perhaps, maybe riding it?

A. That might be right.

Q. Did you continue riding in that same direction, riding the dividing line on the north side of the highway up until the time of the accident?

A. No; I turned to my right as soon as I observed the car in my lane.

Q. When you observed the car in your lane; is that correct? A. Yes.

Q. Now, when you first observed the car, the Penders' car, you have it straddling the double line in that position at W-2; is that correct?

A. Yes.

Q. Isn't it true you did not see the Penders' car until it was in the inside lane of the west-bound traffic?

A. I noticed him coming into my lane.

Q. You didn't see him coming into your lane?

A. I say I did notice him coming into my lane.

Q. Isn't it true you told the police officer in the Monterey Hospital that you first saw Mr. Penders' car pulling into your lane of traffic?

A. Yes.

Q. That is it? A. Yes.

Q. How far had he proceeded into your lane of traffic when you first observed him?

A. I would say he was better than halfway into my lane.

Q. He was better than halfway into your lane of traffic? A. Yes.

(Testimony of Carl B. Wanless.)

Q. At that time you were traveling the inside lane, weren't you?

A. Yes; the outside lane.

Q. The outside lane, rather; yes. Near the dividing line. So when you first observed Mr. Penders' car, he had crossed the double line and had proceeded into the outside lane, isn't that correct?

A. Yes.

Q. So he was way over on the north side of the highway when you first observed him?

A. He was coming over, yes.

Q. But he was in your lane of travel and you were on the outside lane when you first observed him?

Mr. Scholz: I will object to that on the ground it is [215] already asked and answered.

The Court: That does not apply to cross-examination.

Mr. Scholz: I withdraw my objection.

Q. (By Mr. O'Donnell): Approximately how fast, in your opinion, was Mr. Penders' driving when you first observed him?

A. Oh, I would say 25 or 30 miles an hour.

Q. 25 or 30 miles an hour. When you observed him, did you sound your horn? A. No.

Q. You didn't sound your horn. Was your automobile equipped with a horn? A. Yes.

Q. When you observed Mr. Penders in your line of traffic when you were at a point marked by W-1 on this map, what did you do?

(Testimony of Carl B. Wanless.)

A. I applied my brakes and started pulling over to the righthand side.

Q. Pulling over to the righthand side?

A. Yes.

Q. By pulling over to the righthand side you were directing your car in the same direction in which Mr. Penders' car was being driven across the highway, weren't you? A. Yes.

Mr. O'Donnell: Does your Honor want to take a recess now until 2:00 o'clock?

The Court: Yes.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [216]

April 19, 1949, 2:00 o'Clock

CARL B. WANLESS

resumed the stand; previously sworn.

Cross-Examination (Continued)

By Mr. O'Donnell:

Q. Now, Mr. Wanless, as you were proceeding westerly along Fremont Street towards Park Avenue, did you see any automobiles traveling towards you easterly in the opposite direction?

A. No. Just the one of the plaintiff up here.

Q. You just saw——

Mr. Scholz: I object to that on the ground the question is vague.

Mr. O'Donnell: I will reframe the question. When you reached a point marked W-1, did you

(Testimony of Carl B. Wanless.)

see any cars approaching you on the southerly side of the highway traveling east? A. Only one.

Q. What car was that?

A. That was the plaintiff's car.

Q. That was Mr. Penders' car? A. Yes.

Q. You did not observe any other automobile?

A. I didn't see any other.

Q. You didn't see any other. Did you see a bus, one of those transportation buses that operates in and out of Monterey? [217] A. No.

Q. You did not? A. No.

Q. When you first observed Mr. Penders' car from the point which you have marked W-1, did you notice whether or not Mr. Penders had his arm extended?

A. I didn't see if it was extended.

Q. You did not see his arm extended at all. Approximately how far east of Park Avenue is that Del Rey theater?

A. I believe it is about two miles.

Q. And from the time that you left the Del Rey theater up until the happening of this particular accident, did you stop at all in that two mile distance? A. No.

Q. You were driving from the Del Rey theater; is that correct? A. Yes.

Q. Who was in the car with you?

A. Another private, Arthur Dobson.

Q. As I understand, when you first observed the plaintiff's car from the position marked W-1, you

(Testimony of Carl B. Wanless.)

were traveling 35 miles an hour; is that correct?

A. Approximately, yes.

Q. Would you say it was more than 35 miles an hour?

A. I would say it was between 35 and 40.

Q. Between 35 and 40? [218] A. Yes.

Q. You are sure your speed was not exceeding 40 miles per hour?

A. Yes; I am sure of that.

Q. How long had you been maintaining that speed?

A. Oh, I guess I had been traveling at that speed, you might say——

Q. Since your departure from the Del Rey theater? A. Yes.

Q. Before you reached the point marked W-1 on the map, between that point and the Del Rey theater, do you recollect whether or not you passed any other automobile?

A. Yes; I passed one or two, I believe.

Q. Passed one or two other automobiles.

Q. You at all times maintained a speed not in excess of 40 miles an hour?

A. I would say that, yes.

Q. When you observed Mr. Penders' automobile from the position that is marked W-1, what did you do?

A. I applied my brakes and started pulling over towards the shoulder.

Q. You applied your brakes and you mentioned

(Testimony of Carl B. Wanless.)

brakes. Did you apply the footbrake and the emergency brake, or just your footbrake?

A. Just the footbrake.

Q. How long had you been driving this particular automobile? [219]

A. Oh, I would say a couple of months.

Q. When you were assigned to duty, was the same automobile assigned to you at all times?

A. No. We drove different vehicles.

Q. But for a period of approximately two months prior to this accident, you were driving this particular automobile? A. Off and on.

Q. What was the condition of its brakes?

A. I would say it was fair to good.

Q. They were fair to good. Will you give us your definition of what you mean by being fair to good?

A. Well, if you pushed them down about halfway and they would take hold pretty fair and if you pushed them down all the way down, they would lock up on you.

Q. When you first applied your brakes at the position marked W-1, how far did you apply them, halfway or all the way?

A. I had them on all the way.

Q. You had them on all the way. Can you tell us, if you remember, whether or not your wheels locked?

A. I believe some of them must have locked because I heard the tires howling a little.

(Testimony of Carl B. Wanless.)

Q. Did you have occasion after the accident to observe the skid marks upon the pavement?

A. No, I didn't.

Q. You never took it upon yourself after the accident and [220] after you left the hospital to stop there and look at the skid marks?

A. I was in the hospital for three days.

Q. You were in the hospital for three days.. Have you any recollection when you applied your brakes of your car, the rear end swaying back and forth?

A. No, I don't think it swayed back and forth.

Q. Did it do any at all?

A. Very little.

Q. You didn't notice anything unusual in the swaying of the car? A. No.

Q. When you applied your brakes immediately—— A. They applied pretty evenly.

Q. Did you have your foot applied to the brake from the time you first applied it at position W-1 up until the time of the actual impact?

A. Yes.

Q. At no time did you release it?

A. Maybe at the last second, but I believe, as far as I know, I had them on all the way.

Q. You say maybe at the last second. Can you give us any reason why you released them at the last second?

Mr. Scholz: He didn't say he released—— .

(Testimony of Carl B. Wanless.)

Mr. O'Donnell: He said maybe until the last second. [221]

A. Just before you hit, it seemed like everything blacked out. The last I can remember, it seemed to me we were about ten feet apart. After that I don't remember anything.

Q. When you saw an accident was about to happen, did you get, if I might use the expression, jittery,?

A. No, I don't think so; there wasn't time to get jittery.

Q. Did you lose consciousness at the scene of the accident? A. Yes.

Q. Have you any recollection how long you remained in a state of coma?

A. Oh, I would say about five minutes or ten minutes.

Q. When you returned to your normal self again, were you at the scene of the accident?

A. Yes.

Q. Approximately how long did you remain there before you were taken to the Monterey Hospital?

A. I would say five minutes more.

Q. I show you here Plaintiff's Exhibit No. 20 and ask you whether or not you can recognize the cars in that picture.

A. Yes. That is the one I was driving and that is the one Mr. Penders was driving.

Q. The one that you were driving, will you

(Testimony of Carl B. Wanless.)

point to it? A. This one.

Q. That is the one with all the front end crushed in; is that correct? [222] A. Yes.

Q. I show you here Plaintiff's Exhibit No. 18 and ask you whether you can identify those two automobiles. A. Yes. These are the same two.

Q. These are the same two, and the one which appears to have the entire front end crushed in is the automobile which you were operating; is that correct? A. That is correct.

Q. Calling your attention to the righthand corner of Plaintiff's Exhibit No. 20 with reference to this object here, I will ask whether you can identify that particular object.

A. It looks like a seat.

Q. Does that in any way look like what corresponds to the seat that was in and a part of the automobile which you were operating?

A. That looks quite a bit like them; they were folding seats like that.

Q. They were folding seats like that. I show you another object that appears to be a seat upon which the officer appears to be writing and ask whether or not you can identify that.

Mr. Scholz: How do you know that is another object?

Mr. O'Donnell: I don't know whether it is a seat or not.

Mr. Scholz: It might be the same one.

Mr. O'Donnell: No; it is at a different location.

(Testimony of Carl B. Wanless.)

Mr. Scholz: It may have been moved.

Q. (Mr. O'Donnell): Both of them are in the picture.

A. It looks like another folding seat.

Q. Mr. Wanless, after you returned to consciousness, did you remove any of the seats from your automobile? A. No, I don't think so.

Q. You did not. Did you see anyone else remove any seats from your automobile?

A. Not while I was there, no.

Q. Were you still at the scene of the accident when the photographs were being taken by Sgt. Simpson of the military police department?

A. No, I don't think so.

Q. You have no recollection of that?

A. No.

Q. You don't know whether you were there or not? A. No.

Q. After you returned to consciousness, can you tell us whether or not you remember if you saw either one of the seats of the car which you were operating at the time, on the street as portrayed by these two exhibits which I have just showed you, namely, 18 and 20?

A. No, I don't think so.

Q. You did not see them at all?

A. No. [224]

Q. Where were you at the scene of the accident when you returned to consciousness?

A. I was sitting in the driver's seat.

(Testimony of Carl B. Wanless.)

Q. You were sitting in the driver's seat?

A. Yes.

Q. Behind the wheel?

A. Yes, behind the wheel.

Q. You remained there until you were removed?

A. No. I turned on the radio and phoned in and told them to send an ambulance and a wrecker to Fremont and Park Street. Then I assisted the other fellow out and we got out and we were walking around when the ambulance came.

Q. Can you give us any idea, approximately, how fast you were driving at the time of the actual impact? A. No, I can not.

Q. You can not? A. No.

Q. I understand, if I am correct, from your direct examination you are not in a position to tell us whether after the actual impact the cars moved.

A. No, I am not. They spun around a little, but as far as actual forward and backward movement, I can't tell that.

Q. Can you tell us what portion of Mr. Penders' car your car struck?

A. It seemed like I struck his right front corner of his car.. [225]

Q. The right front corner of his car.

A. Yes.

Mr. O'Donnell: I think that is all, Mr. Wanless. Thank you.

(Testimony of Carl B. Wanless.)

Redirect Examination

By Mr. Scholz:

Q. Mr Wanless, when you were at W-1, Mr. Penders' car was at W-2. Now, as you went down there, as I understand it, you pulled to the right, or to the north, to avoid his car? A. Correct.

Q. If Mr. Penders had remained straight, continued straight on, or had not gone to the right side of the road, he would have avoided——

Mr. O'Donnell: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Scholz: That's all.

(Testimony closed.) [226]

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 226 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ KENNETH G. GAGAN,
/s/ B. E. O'HARA,
/s/ RUTH WESTFIELD.

[Endorsed]: Filed Dec. 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Damages Under Federal Tort Claim Act.

Answer and Cross-Complaint.

Answer to Cross-Complaint.

Amendment to Complaint—To second cause of action in plaintiff's complaint.

Amendment to Complaint—To first cause of action in plaintiff's complaint.

Amendment to Complaint—To third cause of action in plaintiff's complaint.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket.

Praecipe for Preparation of Record on Appeal.

Statement of Points to be Relied Upon On Appeal.

Reporter's Transcript—Vol. 1 for April 14, 1949; Vol. 2 for April 15 & 19, 1949.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

Defendant's Exhibits Nos. A, B, C, D, E, and *E.*

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 14th day of December, A. D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12425. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Walter L. Penders and Flora Penders, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 14, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12425

In the Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, FIRST DOE and SECOND DOE,

Appellants,

v.

WALTER L. PENDERS and FLORA PENDERS,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The Trial Court erred

1. In not finding appellant Walter L. Penders was guilty of contributory negligence.

2. That the findings of fact or part thereof are not supported by the evidence.

3. That Flora Penders is not entitled to any damages and her damages cannot be added to Walter Penders' damages.

4. That the damages are excessive.

5. That the Court erred in excluding evidence that the appellees were insured or were compensated for the damages alleged by said appellees.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

Dated: December 16, 1949.

[Endorsd]: Filed December 20, 1949.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD MATERIAL TO CONSIDERATION OF APPEAL

To the Honorable William Denman and to the Honorable Associate Justices of United States Court of Appeals for the Ninth Circuit:

United States of America, Appellant herein, designates for printing the entire certified Transcript of Record, deeming said entire record material to the consideration of this appeal.

Dated: January 13th, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed January 13, 1950.

———

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR USE OF ORIGINAL EXHIBITS ON APPEAL

It Is Hereby Stipulated by and between the parties hereto that the originals of all the exhibits filed in the trial Court in this cause and heretofore transmitted to the Court of Appeals for the Ninth Circuit need not be printed as part of the Record on Appeal but may be considered in their original form and in such original form shall constitute a part of the Record on Appeal; provided further that ex-

cerpts from said exhibits may be printed as appendices to either Appellant's or Respondent's briefs herein.

Dated: This 17th day of January, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for the Appellant.

/s/ EUGENE H. O'DONNELL,
Attorney for Appellee.

/s/ ROBERT E. HALSING,
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Judge of the Court of Appeals.

Dated: January 20, 1950.

/s/ WILLIAM HEALY,
/s/ HOMER BONE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed January 20, 1950.

No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,
Post Office Building, San Francisco 1, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This action was instituted in the United States District Court for the Northern District of California, Southern Division, under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-2680. Following trial and judgment this appeal was commenced in the Court of Appeals for the Ninth Circuit pursuant to Rule 73, Federal Rules of Civil Procedure, and U.S.C. Title 28, Sections 1291 and 1294.

STATEMENT OF THE CASE.

(All page references are to printed Transcript of Record unless otherwise noted.)

Nature of case.

On May 11, 1946, at about 6:40 P.M., in Monterey, California, Walter L. Penders, appellee, was driving with his wife, Flora Penders, as a passenger, in his sedan in an easterly direction on Fremont Street, a four-lane highway divided by a double white center line, toward the intersection of Fremont Street and Park Avenue, a two-lane street. It was daylight, with the weather clear and dry.

Fremont Street runs in a generally east and west direction. Park Avenue runs generally north from the intersection on the north side of Fremont Street. Park Avenue does not cross Fremont Street. At least 100 feet west of the Fremont and Park Avenue intersection Walter L. Penders left the eastbound southerly half of Fremont Street and traveled the remaining distance toward the Park Avenue intersection on the wrong side of the road, i.e., on his left of the center double line and in the *westbound* traffic lanes. (Tr. 138, 155 and 218.) While thus on the wrong side of the roadway, Penders' automobile came into collision with a United States Army panel truck driven in a westerly direction along Fremont Street by Carl B. Wanless, a soldier on authorized Government business.

The collision between Penders' sedan and the Army truck was virtually head on. (Tr. 211.) The impact occurred in the most northerly westbound lane of Fre-

mont Street, approximately forty feet to the west of the Park Avenue intersection. (Tr. 101.)

In the collision both Walter L. Penders and Flora Penders were injured.

Walter L. Penders, seventy-nine years old at the time of the accident (Tr. 219 and 240) suffered a fractured left wrist and fractured left tibia just below the knee. (Tr. 23, VII Finding and Tr. 213-214.) Flora Penders, seventy-seven at the time of the collision (Tr. 71), suffered internal injuries in the accident and subsequently died. (Tr. 24 and 25, XI and XII Findings and Tr. 215 to 217.) At the time of the accident Walter L. Penders was retired. (Plaintiff's Exhibit "B".)

Proceedings in trial Court.

Appellee Walter L. Penders and his wife Flora Penders filed their complaint for damages on May 9, 1947. On April 14, 1949, an "Amendment to Complaint" was filed alleging that on April 10, 1949, Flora Penders died of the injuries alleged in the original complaint and praying for $20,000 general damages for the death of Flora Penders. (Tr. 14.)

After trial the Honorable District Court on June 3, 1949, ordered judgment in favor of appellee Walter L. Penders, awarding damages as follows:

Special damages, medical care of Flora Penders	$17,767.19
Special damages, medical care of Walter L. Penders	5,181.49
Damages to Walter L. Penders' automobile	150.00
General damages to Walter L. Penders for injuries to himself	15,000.00
General damages to Walter L. Penders for loss of his wife, Flora Penders	15,000.00
Total damages	$53,098.68

(Conclusions of Law II, Tr. 27.)

QUESTIONS RAISED ON APPEAL.

Three questions raised on this appeal are:

1. Did the trial Court err in its conclusion of law that the Government driver Wanless was negligent?

2. Did the trial Court err in failing to find that appellee was guilty of contributory negligence?

3. Did the trial Court award excessive damages?

Appellee respectfully submits that each and every one of these questions must be answered affirmatively and the decision of the trial Court should be reversed.

ARGUMENT.

I.

THE TRIAL COURT'S CONCLUSION OF LAW THAT THE GOVERNMENT DRIVER WANLESS WAS NEGLIGENT IS NOT SUPPORTED BY THE EVIDENCE.

The Honorable Trial Court reached the following conclusion of law:

"That defendant, United States of America, was negligent in the manner in which it operated and controlled its 1941 Chevrolet panel truck, which said negligence proximately caused the injuries and damage to plaintiff." (Conclusions of Law II, Tr. 27.)

This conclusion of law appears to be based upon the specific findings of fact made by the trial Court respecting the negligence of the Government driver Wanless. It is appellant's contention that the specific findings of fact made by the trial Court regarding the negligence of Wanless constitute inferences which as a matter of law are not supported by the evidence before the trial Court and now before the Honorable Court of Appeals.

Unquestionably the only finding of fact by the Honorable Trial Court justifying the conclusion of law set forth above is Finding V. (Findings of Fact and Conclusions of Law, Tr. 21-23.)

The substance of Finding V in respect to the negligence of Wanless may be paraphrased as follows:

(1) At the time of the collision Wanless was operating the Government panel truck at an excessive rate of speed. (Tr. 22, lines 6-8.)

(2) Wanless was careless in not keeping a proper lookout, thereby failing to see appellee's automobile until Wanless was approximately 80 feet distant from the intersection of collision. (Tr. 22, lines 10-15.)

(3) Wanless on first seeing appellee's automobile, negligently turned the Government panel truck to the right and struck appellee's car. (Tr. 22, lines 29-30 and 23, lines 1-5.)

It is respectfully submitted that each of the above three findings of fact is not supported by the evidence, for the reasons hereinafter set forth, as a matter of law.

At the outset, however, appellant readily concedes that generally speaking the findings of fact made by a trial Court cannot be disturbed upon appeal unless there is a clear and convincing showing that the findings attacked do not have adequate support in the evidence considered by the trial Court and before the appeal Court. It is appellant's belief that a review of the findings of fact here questioned, however, and a comparison of these findings with the evidence in this case lead inevitably to the conclusion that these findings of fact are erroneous and the trial Court's conclusion of law based thereon, constitutes reversible error.

Gates v. Gen'l. Casualty Co., C.A. 9, 120 F. (2d) 925;

Crawford v. Southern Pacific (1935), 3 C. (2d) 427 at 429;

Jacoby v. Johnson (1948), 84 C.A. (2d) 271.

There is no doubt that where the Appellate Court finds in the record on appeal evidence which constitutes irrebuttable proof that the trial Court's findings of fact have no basis in fact or in *reasonable* inference, the Appeal Court is compelled to disturb the findings and, if appropriate, may reverse the trial Court decision.

> *Pacific American Fisheries v. Hoof,* 44 S. Ct. 38, 263 U.S. 712, 68 L. Ed. 520.

Appellant respectfully submits that this is such a case and presents the following analysis of evidence which was before the trial Court and is now before the Honorable Appellate Court in support of this contention.

(1) Excessive speed.

Finding V of the trial Court refers to Wanless' speed in the following language:

> "That it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed;" (Supra).

This finding says nothing about *how* Wanless' speed was excessive. Testimony by a police officer (Tr. 194) showed that the speed limit in the vicinity of the accident was 55 miles per hour.

Witnesses testifying as to how fast Wanless was driving prior to the accident said he was going from 35 to 40 MPH. Hartshorn, eye-witness to the accident, said "rapid rate". (Tr. 126.) Wanless himself said 35 to 40 MPH. (Tr. 266.) Only the appellee testified

that Wanless was driving more than 35-40 MPH. Appellee thought Wanless was going "70-80 MPH". (Tr. 254.) It must not be overlooked, however, that appellee was hardly in a position to observe accurately how fast Wanless was driving, since appellee's and Wanless' vehicles were moving head on prior to impact. It would seem, therefore that the most reliable evidence before the trial Court on the question of Wanless' speed, estimated it at 35 to 40 miles per hour.

Assuming that 35 to 40 miles an hour was Wanless' speed prior to the accident, it would appear as a matter of law that since the applicable speed limit was 55 MPH, Wanless could not have been operating at an "excessive speed". Certainly, in ordinary circumstances, operation *below* the legal speed limit does not constitute "excessive speed". Undoubtedly, however, peculiar circumstances might make *any* speed "excessive", no matter how far below the speed limit. On an icy road, for example, or on a day with low visibility, operating below the speed limit might easily be excessive. In the case before the Honorable Appellate Court, however, no peculiar road conditions are detailed in the trial Court's findings to justify the inference that Wanless was operating at "Excessive Speed". The evidence shows without contradiction that the day was fair, visibility excellent and roadway dry. (Tr. 97.) In short, no persuasive evidence is found that Wanless' speed was in fact excessive.

Appellee may argue, of course, that Wanless' speed was excessive *because* if it had not been excessive Wanless would not have struck appellee's car. Such

an argument cannot be taken very seriously in view of the wording of Finding V (supra) in respect to "excessive speed". To support such an argument it would be essential that Finding V contain a specific finding that "excessive speed" proximately caused the collision. Actually, Finding V does not state that Wanless' "excessive speed" was the cause of any result. Rather, it appears that "excessive speed" is a kind of editorial comment by the trial Court in preface to the asserted negligence of Wanless, which the trial Court expressly states was the cause of the collision. It must be emphasized that while Finding V does not state that "excessive speed" was the cause of any result, the same finding expressly characterizes as negligence Wanless' alleged failure to keep a lookout and his turning to the right upon seeing appellee's car, positively stating that the latter of these negligent acts (Wanless' negligently turning right), caused the collision.

We have proceeded in this argument thus far on the assumption that Wanless' speed was *not* excessive. Even if we assume, however, that Wanless' speed was in fact excessive, a finding of fact that it was excessive, in the absence of a finding of fact that excessive speed constituted negligence and caused this collision, cannot support the trial Court's judgment in this case. The California cases have long held that a mere showing of excessive speed without facts establishing that such speed was negligent, does not justify judgment for a plaintiff collision victim. California Vehicle Code 511 reflects this rule in providing violation of a

prima facie speed limit does not establish negligence as a matter of law.

(2) Wanless' lookout.

Finding V states:

"Carl B. Wanless operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection * * *"

In contrast to the trial Court's reference to "excessive speed", Wanless' alleged failure to keep a lookout is expressly characterized as negligent, but, as in the case of Wanless' asserted excessive speed, Wanless' failure to keep a lookout is *not* given as a cause resulting in the collision. The fact that the trial Court did not regard Wanless' claimed failure to keep a lookout as the cause of the collision might, of itself, be deemed more than adequate to support appellant's contention that Wanless committed no actionable negligence in respect to lookout. But we believe that the Appellate Court should be informed as to the relation between the finding of failure to keep a lookout and the only evidence regarding lookout in the record.

The record discloses that no one testified that Wanless was *not* maintaining a proper lookout. The testimony of Hartshorn, the eye-witness, comes closest to fully credible testimony regarding Wanless' lookout. Hartshorn was driving a bus, proceeding in the same direction as appellee. Hartshorn stated that just be-

fore the accident he was driving behind appellee for some distance, and having a line of vision 8 feet above road level, he was able to see further ahead than appellee. (Tr. 119.) Just before the collision Hartshorn saw Wanless' panel truck coming from the opposite direction. (Tr. 124.) Hartshorn estimated that when he first observed the oncoming panel truck it was approximately 175-200 feet east of the intersection. (Tr. 125.) This distance is highly significant, since Finding V expressly states that "It is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approximately 150 to 175 feet to a person approaching said intersection from the *westerly* direction." (Tr. 22, lines 15-19.) We italicize the word "westerly" because it would appear that it is a misprint in the printed Transcript of Record and should be "easterly", since Wanless was approaching from the east.

To continue our analysis of Hartshorn's testimony, this witness stated that after he first sighted Wanless' oncoming panel truck, when Wanless was "a good 175 to 200 feet the other side" of the intersection (Tr. 125) he observed:

> "Well, as it came up, the closer it got, I could see that he *had noticed* the vehicle in the street, the other vehicle. You could tell that he was applying the brakes because the Army vehicle was, you could tell that he was putting on brakes, not, because the Army vehicle * * *" (Tr. 127.) (Emphasis ours.)

The only meaning that the quoted testimony can possibly have is that contrary to Finding V's implication of improper lookout, Wanless must have perceived appellee's vehicle at or about exactly the time when it was first visible to Wanless. We agree entirely with the trial Court's Finding V, that apellee's car could not possibly be visible to Wanless sooner than the instant when Wanless reached a point 150 to 175 feet from the Fremont and Park intersection. The above-quoted testimony of Hartshorn is uncontradicted, and being the *only* evidence on the subject of lookout besides the corroborating testimony of Wanless himself (Tr. 266), precludes the inference contained in Finding V that Wanless was careless in not keeping a proper lookout.

In addition to the fact that all the testimony regarding lookout establishes a proper lookout by Wanless, it is respectfully submitted the physical facts of the collision confirm appellant's contention hereinafter that a proper lookout was in fact maintained by Wanless.

Finding V, quoted above, expressly states that Wanless first observed appellee's car approximately 80 feet distant from the intersection (supra). Assuming "intersection", as employed in Finding V, in respect to Wanless' lookout, means the center of the intersection of Park Avenue and Fremont, the physical evidence of the collision irrefutably establishes that Wanless *must* have seen appellee's car long before he reached a point "approximately 80 feet distant from the intersection". If it is *true* that Wanless saw ap-

pellee's car when Wanless was 80 feet from the intersection, it is difficult, if not impossible, to explain how Wanless' panel truck left *102* feet of skidmarks. It cannot be considered probable that Wanless put his brakes on *before* he saw appellee's car. The skidmarks were measured from point of origin to the point where Wanless' panel truck came to rest after the collision. (Tr. 83, 98.) One might argue that Wanless may have put his brakes on at the point 80 feet from the intersection and nevertheless produced skidmarks of 102 feet because the cars after collision might have traveled the additional distance representing the difference between 80 and 102, or 22 feet after impact.

Such an argument would have to overlook a fundamental premise of the trial Court's conclusion of law that Wanless' negligence, and not appellee's, was legally responsible for the collision. This fundamental premise, expressed in Finding XVI, which exculpates appellee from any carelessness and negligence, is that appellee was in the intersection in *proper position* for a left-hand turn at the time of the collision. If it is true that appellee was in the intersection in a proper position for a left-hand turn, according to the requirements of California Vehicle Code 540(b), it follows that the point of impact was *east* of the center of the intersection of Pine and Fremont and that after impact both vehicles must have moved no more than approximately 22 feet west of the center of Park Avenue intersection. Assuming the first point at which Wanless saw appellee's car was 80 feet from the center of Park Avenue (as Finding V asserts), and as-

suming further than when first seen by Wanless, appellee's car was in the act of completing its left-hand turn, by implication *legally,* i.e., turning left properly in the eastern half of the intersection, as asserted by Finding V: "said plaintiff was in the act of completing his turn and was in the outer westbound lane of Fremont Street", the only way in which these two assumptions can be reconciled with the measured skid-marks of 102 feet, is to establish by competent evidence, that the vehicles came to rest approximately 22 feet west of the point of impact. But the physical evidence of the collision recorded immediately after the accident by a police officer experienced in recording such data, shows that the vehicles were found at rest after collision more than 53 feet from the center of Park Avenue. (Testimony of Police Officer Davenport, Tr. 99-100.)

Does the evidence show how far after impact the vehicles moved? Once again resort must be had to Hartshorn, the bus-driver eye-witness. Hartshorn, whose testimony, it may be observed, was generally favorable at the trial to appellee's case, was unable to estimate exactly how far the vehicles moved after impact. (Tr. 128-129.) His final estimate, after questioning by the trial Court, was "about 15 feet". (Tr. 129.) In other words, the only evidence of how far the cars actually did move after impact showed approximately no more than one-third of the distance the cars would have moved if the trial Court's Finding V were correct in respect to the inference that Wanless first saw appellee's car when Wanless was

only 80 feet distant from the intersection and appellee's car. Such a wide discrepancy, over 45 feet, between the distance the cars moved after impact and the distance they *ought* to have moved if Finding V were correct, about the distance at which Wanless first saw appellee's car, suggests that Finding V is clearly erroneous in its inference as to what lookout Wanless kept.

(3) Wanless' right turn.

The concluding act of negligence charged against Wanless by Finding V is detailed in these words:

> "That it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street."

In the above-quoted portion of Finding V we have the ultimate conclusion of Finding V, and, so to speak, a dramatic full flowering of negligence. The Honorable Trial Court in this final clause regarding Wanless' right turn brings to a resounding climax the hints of culpable negligence suggested in Finding V's references to Wanless' purported excessive speed and improper lookout. Wanless' "excessive speed" was not labeled negligent, but merely mentioned as a kind of overture to negligence. (Supra.) Wanless' "improper lookout" following the asserted excessive speed is forthrightly identified as negligent in the next princi-

pal clause of Finding V. (Supra.) But, as in the case of "excessive speed", even though termed "negligent", Finding V's inference of improper lookout does not provide any legal basis for the conclusion of law that Wanless was *culpably* negligent, since the trial Court does not infer that failure to observe caused the collision.

Finding V in its ultimate accusation of a negligent turn to the right, provides exactly the missing legally actionable accusation of negligence. For Finding V states that Wanless' right turn on first observing appellee's car was careless, and thereupon Wanless struck appellee's car.

It is respectfully submitted that if all the inferences preceding this ultimate inference of a negligent right turn in Finding V *are* true, then the trial Court's inference that Wanless negligently and carelessly turned right must be false. This is particularly true in respect to the inference in Finding V that "when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of *completing his turn and was in the outer west bound lane of Fremont Street;* that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm;". (Emphasis added.) The plain meaning of this statement from Finding V is that when Wanless first saw appellee's car it must have appeared clearly and evidently to be in the process of completing a left-hand turn. In considering this portion of Finding V we must assume that "completing" means

completing in a proper and legal manner in order to be consistent with Finding XVI, which expressly states that appellee was not negligent. But if the inference is correct that Wanless turned right when he saw appellee completing a left turn, it would be reasonable, indeed inevitable, that the evidence of the physical data of the collision would bear out this inference by the trial Court. Far from bearing out this inference, however, we find that the physical data of the collision point to an entirely different inference (see appellee's contributory negligence), and leads us to infer, either

(1) When first seen by Wanless appellee could not have been "in the act of completing his turn", or

(2) If appellee was "in the act of completing his turn", his turn could not have been proper and legal according to established standards of due care under California Vehicle Code 540(b). California Vehicle Code 540(b) reads:

"* * *

(b) Left Turns on Two-way Roadways. At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered."

A brief discussion of the two above suggested "either or" alternatives may be of considerable benefit in exposing the error which appellant asserts exists in Finding V's concluding inference that Wanless negligently turned right and struck appellee when appellee was completing a left turn. The first alternative is that appellee could not have been in the act of *completing* his turn. If the word "completing" means to finish, or to do the final acts necessary to make a left turn, there should be ample evidence of an irrebuttable nature in the record on this point. The record is replete, of course, with testimony regarding appellee's completion of his left turn just before the collision. Certainly the most favorable construction placed upon appellee's own testimony leaves no doubt that in appellee's opinion his car was struck while *completing* a left turn. (Tr. 210.) We believe, however, that this testimony and all other testimony to the effect that appellee's car was completing a left turn when hit, must be disregarded in its entirety in the face of photographic evidence presented by appellee.

At the trial the appellee placed in evidence photographs of the vehicles after the accident. (Tr. 81.) Appellant believes that these photographs, notably Plaintiff's Exhibits 17, 18, 19 and 20, as will be shown hereinafter, conclusively establish that at the time appellee's car was struck it could not have been in the process of *completing* a left turn.

Granting that "completing" was used by the trial Court in its ordinary sense, as suggested above, these

photographs should present pictures of physical evidence, *conclusive* proof, that appellee's car was struck in the process of completing a left turn. To the contrary, these pictures, analyzed most favorably for appellee, show appellee's car, at the very most, was *commencing,* and at that barely commencing, its left turn. Examination and careful reflection upon the contents of these photographs, together with a comparison of their contents with the admitted circumstances of this collision, will show why appellee's car was in fact *not completing* a left turn when struck.

Let us start with the admitted circumstances of the accident: it is admitted that appellee was driving east, appellant west. Let us admit appellee at some time immediately prior to the accident signaled to indicate he intended to make a left-hand turn, a turn to the north. The highway from which appellee was to make his left turn was a four-lane highway. An automobile being turned left from a four-lane highway may reasonably be regarded as completing its left turn when its front wheels enter the northernmost lane of the highway. Certainly the trial Court's Finding V implies that appellee's position in the "outer west bound lane" (which would be the northernmost lane) must be some indication that appellee was "completing" his left turn.

If we assume that just as appellee's car turning left is completing its turn, it is struck by a car moving west, which is certainly conceded by all the evidence

in this case, it would necessarily follow that the car completing its left turn would be struck on its right side. Plaintiff's Exhibit 20, however, as the Appellate Court will perceive, shows appellee's vehicle to be virtually undamaged on its right side. There is no visible damage on the right side of appellee's vehicle further back than the engine cowl, save a scratched and dented spot on the right side of the car above the right side rear window. From the front edge of the door on the right side of appellee's car to the furthermost rear tip of its right rear fender there is no physical evidence that the Government panel truck struck appellee's car on the right side in the manner in which appellee's car would have been struck if completing a left turn. (Plaintiff's Exhibit 20.) It is our conclusion from this photograph that when struck, appellee could not have been "completing" his left turn in the sense of finishing his turn or doing the final acts necessary for a left turn from a four-lane highway. We submit that this photograph shows physical evidence entirely inconsistent with the trial Court's inference that appellee was "completing" his left turn when hit.

Galloway v. U.S., 9 C., 1942, 130 F. (2d) 467. Affirmed 1942; 63 S. Ct. 1077; 319 U.S. 372, 87 L. Ed. 1458; rehearing denied 1942; 63 S. Ct. 1443; 320 U.S. 214, 87 L. Ed. 1851.

Justice Rutledge observes in the *Galloway* case (319 U.S. 372 at 387):

> "No case has been cited and none has been found in which inference, however expert, has

> been permitted to make so broad a leap and take the place of evidence, which according to all reason must have been at hand."

Similarly in the case at bar, the inference of the trial Court that appellee was "completing" his left turn, cannot take the place of physical evidence, embodied in the plaintiff's photographs in evidence, showing appellee could not have been completing his turn when hit.

The second alternative suggested above, namely, that perhaps the trial Court used the words "completing his turn" to refer not to a *proper* left turn from a four-lane highway, but rather the *particular* left turn which appellee was in fact endeavoring to make at the time of the accident. It is quite conceivable that the trial Court meant "completing his turn" to describe a left turn commenced by appellee from some point other than a point in the southern half of the four-way lane highway here involved. If such is the meaning of "completing his turn", appellee's car at the time of impact would be in an entirely different position than that of a car completing a left turn commenced in the left south half of this four-lane highway. Plaintiff's Exhibit 19, showing the left side and front of appellee's car after the collision shows that it is possible the words "completing his turn" refer to the completing of a turn commenced somewhere in the northern or *wrong* side of this four-lane highway. Plaintiff's Exhibit 19 (compare Plaintiff's Exhibit 20) shows the left side of appellee's car was

virtually undamaged. The left side of appellee's car is almost without a scratch so far as this photograph (Exhibit 19) shows. But the interesting thing about Plaintiff's Exhibit 19 is that when taken together with Plaintiff's Exhibit 20, it provides irrebutable physical evidence that this collision was *head on* with at most a mere tendency to the right front of appellee's car. Thus the right front tire of appellee's car is flat, the left front tire does not appear to be.

These two pictures (Plaintiff's Exhibits 19 and 20) provide convincing physical evidence that if when struck appellee was "completing his turn", that turn must have been an improper left turn commenced somewhere in the northern half of the four-lane highway. Indeed, we might observe, these two pictures clearly suggest that "completing his turn" is a misdescription. These pictures imply conclusively that rather than completing his turn, appellee *must have been commencing his turn when struck.*

We believe that it would be an imposition upon the Appellate Court to review all of the oral testimony of each of the witnesses who testified as to the position of appellee's car when struck and who testified that appellee was *completing* his turn when struck. (See appellee's own testimony in this regard, Tr. 210.) As a matter of fact, both appellee and eyewitness Hartshorn testified appellee was completing his turn when hit. (Tr. 210, 244, 257, appellee's testimony; 120, 128, 129 Hartshorn testimony.) Both of these witnesses were impeached, however, and only the trial Court

which heard them testify can say whether the version they told on the trial or their prior conflicting statements are the most credible accounts of the accident. (Hartshorn, Tr. 136-7; appellee, Tr. 238 et seq.) Appellant respectfully submits, however, that regardless of what the testimony was by either appellee or Hartshorn, the true account of what happened in this accident is properly deduced from appellee's own exhibits (Plaintiff's 19 and 20). In these pictures the camera recorded permanently an unchanging record of what *did* happen, not what this or that witness thinks happened.

It has long been the rule that physical evidence cannot be contradicted by the conflicting testimony of witnesses, however well qualified.

U. S. v. Galloway, supra.

Also see

Oklahoma Ry. v. Ivery, Okla. 1949, 204 P. (2d) 978 at 980,

(involved use of photographs to show physical evidence.)

Stolte v. Larkin, 1940, 8 C., 110 F. (2d) 226 at 229:

"Generally when undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make out a case for the plaintiff, the physical facts must control and the jury cannot return a verdict based upon oral testimony flatly opposed to physical facts."

See also

American Car and Foundry v. Kinderman, 8 C., 1914, 216 F. 499, 502;

Lee Way Motor Freight v. True, 10 C., 1948, 165 F. (2d) 38.

What *did* happen? As stated above, appellant respectfully submits that Plaintiff's Exhibits 19 and 20 show conclusively that it cannot be true that appellee was "completing" a legal left turn when his car was struck. What is the significance of this fact? It is significant because since appellee was not *completing* his turn when struck, Wanless *a fortiori* could never have observed appellee in the act of *commencing* a left turn. Appellant's contention in this respect is supported by the trial Court's own finding that "Wanless did not observe plaintiff's extended arm" signaling for a left turn. (Finding V, lines 24-25.) What Wanless must have observed, it is submitted, must have been what Wanless said he observed. Wanless testified:

> "As I drove west on Fremont Street, I came over the slight hill there and I noticed this other car just crossing the center line into my line of traffic; I would say he was, oh, at least 150 feet, or maybe 175, and he kept coming over at an angle into my lane, so I cut over further towards the outside lane, and I noticed that he still kept coming over at an angle, so I went as close to the curb as I dared and we hit head on there." (Tr. 266.)

Plaintiff's Exhibits 19 and 20 confirm this testimony. Indeed, Plaintiff's Exhibits 17 and 18 likewise re-

inforce this testimony. Exhibits 17 and 18 show the vehicles after the collision from a position in front of them. These pictures, 17 and 18, show the uniformity of damage to the front end of the Government panel truck, the uniform front end damage to appellee's car and the relative position of the cars after collision. Note that both vehicles rested on all four wheels after the collision, note that the front end of appellee's car was over the North Fremont Street curb, and finally note the proximity of the fronts of both cars to each other. It is respectfully submitted that these four photographs speak more convincingly than any witness produced by appellee and positively refute the inferences of Finding V that Wanless observed appellee *completing* his turn and carelessly turned right to cause this collision. Under the authority of the cases cited above, the physical facts established by these photographs must prevail over contrary testimony.

We have stated above that Wanless could not have observed appellee either completing or commencing his turn. There is no question that Wanless *did* observe appellee's car before the collision, evidence the skidmarks (supra). But what did Wanless observe appellee to be doing before the collision? We submit that Wanless observed appellee headed straight for Wanless, that and nothing more, whereupon Wanless endeavored to avoid a head on collision.

Can there be any serious question that confronted with a possible head-on collision, Wanless was faced with an immediate peril, an emergency? To ask this

question is to answer it. Wanless was faced with an emergency and he reacted as fast and as well as his capacities permitted. There is no evidence whatsoever that he debated with himself as to what he would do—he says himself he "cut over further towards the outside lane". (Tr. 266.) To infer that such conduct amounts to carelessness and negligence, as did the trial Court in Finding V, is to disregard the long-standing and frequently-observed rule of the California Courts that acts in an emergency intended to avert catastrophe which in fact cause the very catastrophe sought to be escaped, cannot constitute negligence. The soundness of this rule is self-evident. No man should be penalized because his quickest thinking in time of emergency does not coincide with the thoughts of counsel for plaintiff. See

Stolte v. Larkin, supra, at 230.

A recent California decision is

Stickel v. Durfee, 1948, 88 C.A. (2d) 402, 199 P. (2d) 16.

Appellant submits that in the instant case Wanless, far from being negligent, was endeavoring by the exercise of immediate care to avert collision. In his attempt to avert disaster, Wanless was legally privileged to act in reliance and upon the assumption that appellee would perform his duty of care to keep to the right half of the highway.

California Vehicle Code, Section 525.

As stated in

Gornstein v. Priver, 1923, 64 Cal. App. 249 at 259,

"The general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it."

Appellant respectfully submits that Wanless, in all the circumstances of this case, as conclusively established by the photographs in evidence, was not negligent.

II.

APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The photographic evidence presented by appellee in the trial Court (Plaintiff's Exhibits 17-20 inclusive) has been discussed at length above from the standpoint of its proof that Wanless was not negligent. This same photographic evidence may be considered for its proof of appellee's contributory negligence. It is respectfully submitted that this photographic evidence shows that the collision was virtually head on (supra). Even the appellee in his own testimony conceded that the collision was head on (Tr. 211), if it be suggested that the photographs put in evidence by appellee, do not fully establish a head on collision.

If it is true that this collision was virtually head on, and this cannot be disputed, it follows inevitably that

appellee must have been negligent in the manner of executing his left-hand turn, since he could not have been making his left turn as dictated by California Vehicle Code 540(b). To have executed, or even to have commenced to execute, a proper left-hand turn from the Fremont four-lane highway, would have made it physically impossible for appellee to be hit head on, as he was, in the northernmost lane of the highway. (Finding V, supra.) It follows, further, the only reasonable inference from this evidence is that appellee's execution of his left-hand turn was careless and constituted contributory negligence in all of the circumstances of this case.

California Courts have long followed the rule that contributory negligence, even in the slightest degree, shall bar a plaintiff from recovery for a defendant's negligence. A long line of decisions in California has established the rule that

> "The failure of a person to perform a duty imposed upon him by law is negligence per se and if such negligence proximately contributes to his injury, he cannot recover."
>
> *Hardin v. Sutherland,* 106 C.A. 479 (289 P. 900).

It is respectfully submitted that the physical evidence presented by plaintiff to the trial Court conclusively establishes that Penders was violating 540(b) of the California Vehicle Code at the time of the accident. Such violation constituted contributory negligence on Penders' part and would bar him from any recovery in the suit at bar. It was error for the trial

Court not to find that Penders was guilty of contributory negligence. It follows, furthermore, that the trial Court's finding that Penders was *not* negligent (Finding XVI, Tr. 26) was directly contrary to the evidence presented and cannot stand.

As a matter of law, upon a finding of contributory negligence, it is submitted, appellee cannot recover in the instant case.

> "The plaintiff is held not to be entitled to recovery if he was 'guilty of contributory negligence, however slight', even though the defendant may have been 'most to blame'.
>
> "Any negligence on the part of the plaintiff which contributes even in a slight degree to the accident is contributory negligence, barring a recovery; and it is error for the Court not to instruct the jury to such effect."
>
> 2 *Cal. Jur. Supp.* 170, referring to *Markham v. Hancock Oil Co.,* 2 C.A. (2d) 392, 37 Pac. (2d) 1087, and other cases.

In

> *Texas Co. v. Hood, et al.,* 161 F. (2d) 618 (C.C.A.-5)

nvolving a truck and auto collision, the Court said (620):

> "The circumstances sought to be shown by plaintiff, even if all were admitted to be proven, are entirely consistent with the positive, uncontradicted and unimpeached testimony of the three eye witnesses as to how the collision occurred, where two equally justifiable inferences may be drawn from the facts proven, one for and one

against the plaintiff, neither is proven and the verdict must be against him who had the burden of proof * * *. Moreover, where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven and which uncontradicted evidence shows affirmatively that the facts sought to be proven did not exist * * * no lawful finding can be made of its existence * * *".

It is submitted, in view of the only reasonable inference that may be drawn from appellee's photographic evidence in this case, appellee's contributory negligence makes the trial Court's Finding XVI (Tr. 26) that appellee was *not* negligent, constitutes reversible error.

III.

THE TRIAL COURT AWARDED EXCESSIVE DAMAGES.

Appellant readily admits that the question of excessive damages seldom provides a persuasive basis for reversal. Nevertheless, there is little doubt that an Appellate Court may be constrained to reverse a judgment awarding damages that are patently excessive.

Fornwalt v. Reading Co., Dist. Ct. E.D. Pa., 1948, 79 F. Supp. 921;

Barrett v. S. P. Co., 1929, 207 C. 154.

In the instant case it is submitted that excessive damages were granted appellee, at least as to a portion of the judgment. Appellant concedes that the following three items of damages awarded by trial Court are not properly subject to the criticism that they are excessive: damages for (1) medical care for Walter L. Penders; (2) medical care for Flora Penders; (3) loss of the Penders automobile.

The general damages awarded Walter L. Penders for injuries to himself and for the death of his wife, however, are clearly excessive. Penders' injuries resulted in a permanently affected wrist and leg. (Tr. 49-54.) There is no testimony as to what effect these physical handicaps had upon Walter L. Penders' earning capacity. The record shows that besides being almost 80 years of age at the time of the accident, Walter L. Penders was *retired*. (Tr. 240 and Defendant's Exhibit "E", Deposition of Walter L. Penders; Defendant's Exhibit "B", Vehicle Accident Report, refers to Walter L. Penders as "retired".) Despite this total lack of evidence as to any loss of livelihood, the trial Court awarded Walter L. Penders $15,000 general damages for injuries to himself. (Tr. 28.) Even allowing for the existing inflationary trend, this award appears extraordinarily high and without evidence to justify it.

Mondine v. Sarlin, 1938, 11 C. (2d) 593 at 599, involved a case of severe burns, necessitating extensive surgery. The Court cut in half the trial Court's award of $20,000. See also

Hallinan v. Prindle, 1936, 17 C.A. (2d) 656.

The questionable award of $15,000 to Walter L. Penders for the disability to himself is made more questionable when we compare this award with the award to Walter L. Penders for the loss of his wife. For the limited permanent disability suffered by his wrist and leg, $15,000; for the loss of his wife, $15,000. The coincidence of these awards bespeaks an arbitrary award in either or both. Certainly the loss of one's wife must be more serious than an impairment of one's left wrist and knee action. Does it not follow that a higher award should be given for the loss of the priceless intangibles of marriage than for mere physical discomfort? It is obvious, we believe, that the general damages here awarded in strict equality for two widely divergent losses—losses which are as far apart in degree of pain and suffering as we can imagine, by their very equality suggest their arbitrary nature. It may be said that the equality of the two awards for general damages is mere coincidence, and in fact, may by some formula be mathematically calculated as correct, considering all the factors involved in each of the two losses suffered by Walter L. Penders. Conceding that the awards were merely coincidental, it should be pointed out that just as the award for physical injury to Walter Penders was excessive in its own right, so it would appear that $15,000 for the loss of Mrs. Penders is excessive in its own right, for Mrs. Penders was as aged as Mr. Penders at the time of her death, taking as true the evidence most complimentary to Mrs. Penders, which places her age at seventy-seven when injured and eighty upon her death

n 1949. (Tr. 71, testimony of Dr. Dormody, Mrs. Penlers' attending physician.) Mrs. Penders' life expecancy, absent any evidence of some monetary estimate f the pecuniary worth of her presence in Mr. Penlers' household, would hardly appear to justify the ward here of $15,000. The usual theory of damages n tort claims bases damages upon the ground that the ward compensates the injured person for the injury uffered, i.e., restoring him as nearly as possible to his ormer position or giving him some pecuniary equivaent. (Restatement of Torts, Sections 901, 903, 905, 06.) Appellant respectfully submits that an application of this most widely accepted theory of damages esults in the conclusion there is no sound basis in fact r inference for the amount of the award here given s general damages for the death of Mrs. Penders, appellee's wife.

CONCLUSION.

In view of the foregoing, it is respectfully urged hat the judgment of the Honorable District Court hould be reversed.

Dated, San Francisco, California,
March 31, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

FOREWORD.

Appellant has not put in its opening brief anything hat purports to be a statement of facts proven upon he trial. In lieu of such a statement it has selected solated portions of the testimony referring only to uch thereof as is favorable to its contention and ig-oring the testimony which supports the findings and udgment of the trial Court. From these selected ex-erpts and from its own conclusion as to what the udgment of the trial Court should have been, it rgues that the findings of fact find no support in he evidence and that appellee was guilty of contribu-

(NOTE): All numerals in parentheses refer to pages in Tran-cript of Record, unless otherwise noted. Italics ours unless other-ise noted.

tory negligence as a matter of law. In so doing, appellant ignores the rule that conflicts in testimony cannot be resolved by this Court. However, it does concede that the trial Court's findings cannot be disturbed upon appeal unless there is clear and convincing evidence showing that the same are not supported by the evidence. It also ignores the rule that where evidence, even though conflicting, supports the findings and judgment of the trial Court, the Appellate Court will not order a reversal. Furthermore, it is an elementary rule in appeal procedure that an appellate tribunal must take the view of the evidence and the inferences deducible therefrom which is most favorable to the appellee.

The rules herein mentioned are set forth in full in the following cases:

Bellon v. Silver Gate Theatres, Inc., 4 Cal. (2d) page 1, at pages 13 and 14;

Cleo Syrup Co. v. Coca-Cola Co., 139 Fed. (2d) 416.

Like language may also be found in

Jacoby v. Johnson, 84 Cal. App. (2d) 271;

Crawford v. Southern Pacific, 3 Cal. (2d) 422, 429,

both of which cases are cited by appellant in its opening brief. Appellee is entitled to have a fair statement of facts which supports the findings and judgment of the trial Court. Appellee will endeavor to present a condensed statement of facts supported by the record in this particular case to show that the negligence of the appellant, as well as the alleged

contributory negligence of appellee, if any, was a question of fact for the trial Court.

STATEMENT OF FACTS.

The trial Court gave judgment for appellee in the sum of fifty-three thousand ninety-eight and 68/100 dollars ($53,098.68) as damages sustained by appellee as a result of the negligent operation of appellant's automobile, as computed in the order for judgment appearing on page 18 of the transcript of record.

On May 11, 1946, about 6:40 P.M., Walter Penders was driving his automobile in an easterly direction on Fremont Street, in the City of Monterey, California, approaching the intersection of that street with Park Avenue. At that time Walter Penders was accompanied by his wife and two other passengers (Tr. p. 205). At the same time one Carl W. Wanless, a soldier in the U. S. Army was operating a Government owned automobile along Fremont Street in a westerly direction approaching the intersection of that street with Park Avenue.

Fremont Street is a four-lane highway with a white center line dividing the eastbound and westbound lanes (see Defendant's Exhibit "A"). Approaching east towards Park Avenue, Fremont Street ascends a grade of approximately ten per cent (10%) (Tr. p. 104), and then turns to the left at the crest of the grade (Tr. p. 104). The crest of the grade is about one hundred and fifty-five (155) feet east of

the center line of Park Avenue (Tr. p. 196). Park Avenue is just below the crest of the grade. East of Park Avenue Fremont Street is a four-lane highway with the northerly westbound lane abutting the edge of the sidewalk curbing (Tr. p. 200). West of Park Avenue, between the northerly paved portion of Fremont Street and the sidewalk curbing there is an unimproved gravel shoulder, approximately sixteen feet wide (Tr. p. 200). Because of the contour of the roadway of Fremont Street, one driving an automobile westerly on Fremont Street could not see an automobile in the intersection of Park Avenue and Fremont Street beyond one hundred and fifty-five (155) feet (Tr. p. 193). From a point approximately one hundred and fifty-five (155) feet east of the center line of Park Avenue one has a clear view of Fremont Street.

Appellee on the day in question was driving about twenty (20) miles per hour easterly on Fremont Street and when opposite Park Avenue proceeded to make a left hand turn into Park Avenue (Tr. pp. 209, 210). Before making his left hand turn appellee had extended his arm from the automobile which he was operating, indicating his intention to make said turn (Tr. p. 123). Before starting to make said left hand turn appellee looked ahead and observed no automobile approaching from the east and with his arm still extended proceeded to make the turn into Park Avenue (Tr. p. 209). After completing his turn appellee proceeded over and across the center line and inner westbound lane on Fremont Street and was approxi-

mately two-thirds across the outer westbound lane of Fremont Street when the U. S. Army panel truck, driven and operated by defendant, Wanless, approached appellee from the east at a rapid rate of speed (Tr. p. 126), which speed appellee contends was between seventy (70) and eighty (80) miles per hour (Tr. p. 254) and collided with appellee's automobile on the right front side thereof behind the front bumper, knocking appellee's automobile sideways down the hill, approximately fifteen (15) feet and up against the north curb of Fremont Street (Tr. pp. 128, 129). As a result of the collision appellee and his wife and the other occupants of the car were rendered unconscious (Tr. p. 211).

That immediately after the happening of the accident police officers observed that skid marks caused by the Government vehicle extended for a distance of one hundred and two (102) feet easterly from the position of the Government vehicle after the impact (Tr. pp. 98, 101). The force of the impact was so severe that the jump seats of the Government automobile were thrown on the highway (Tr. p. 153).

Wanless first noticed appellee's car when he "topped the hill" (Tr. p. 167), he applied his brakes and the panel truck started to swerve and the brakes squealed (Tr. p. 169). The condition of the brakes of the panel truck were fair to good (Tr. p. 279). At the time Wanless did not observe the bus operated by witness Hartshorn (Tr. p. 278), nor did he observe appellee's extended arm (Tr. p. 278).

Before the accident Walter Penders was a healthy, strong and robust man. As a result of this accident he suffered severe injuries (Tr. pp. 44, 51, 57), necessitating his hospitalization from May 11, 1946 to March 24, 1947 (Tr. p. 45). Appellee's wife, Flora Penders, likewise suffered severe injuries (Tr. pp. 57, 62, 64), necessitating her hospitalization from May 11, 1946, until April 10, 1949, the date of her death. Flora Penders' death was a proximate result of the injuries which she suffered in this particular accident (Tr. p. 64). As a result of the accident, appellee suffered a broken leg, broken arm and severe shock to his nervous system (Tr. p. 212). The injuries suffered by him are permanent (Tr. pp. 212, 214). Appellee and his wife were married in 1905 and during their entire married career they were never separated, save and except for a period of one month (Tr. p. 216).

ARGUMENT.

1. THE TRIAL COURT'S FINDINGS OF NEGLIGENCE IS FULLY SUPPORTED BY THE EVIDENCE.

After a very thorough and complete hearing and after the trial judge had occasion to listen and hear the testimony of the respective parties and the witnesses produced on their behalf and to observe their manner of testifying and demeanor on the stand, the trial Court prepared findings of fact and conclusions of law which were succinct and to the point, a portion of which appellee feels is well worthy of repetition at this point.

"VI. That it is true that on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff, Walter L. Penders, with Flora Penders as a passenger therein, was driving his 1934 Hupmobile Sedan automobile, then and there owned by said plaintiff, Walter L. Penders, in an easterly direction on said Fremont Street, and at said time was turning northerly into said Park Avenue at the intersection of said Fremont Street and Park Avenue, at which time, and for sometime prior thereto, plaintiff, Walter L. Penders, had extended his arm indicating his intention of making the aforesaid turn; that at said time and place said Carl B. Wanless, acting as the agent, servant and employee of defendant, United States of America, and acting within the course and scope of his authority and employment as such agent, servant and employee, and with the knowledge, permission and consent of said defendant, United States of America, was operating and controlling a United States Army 1941 Chevrolet panel truck in a westerly direction in the outer west bound lane of said Fremont Street; that it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed; that it is true that at said time said defendant, Carl B. Wanless, operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection of said Fremont Street and Park Avenue; that it is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approxi-

mately 150 to 175 feet to a person approaching said intersection from the westerly direction; that it is true that when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of completing his turn and was in the outer west bound lane of Fremont Street; that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm; that it is true that at said time there were no vehicles ahead, abreast or behind said defendant, Carl B. Wanless, in the inner or outer west bound lane; that it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street.

VII. That it is true that by reason of the aforesaid carelessness and negligence of the defendant, Carl B. Wanless, and as a proximate result thereof, the said plaintiff, Walter L. Penders, was caused to be, and he was cut, bruised, lacerated * * *."

Appellant argues that the above findings do not find support in the evidence. However, appellant does concede that the findings of fact of the trial Court cannot be disturbed on appeal unless they are inadequately supported by the evidence. Apparently this is conceded because it is an elementary principle of appellate procedure. It is surprising that appellant has not made further concessions in this regard and

ppellee sincerely believes that if there were any nerit to this particular appeal appellant would likewise readily concede that the question of negligence nd that of contributory negligence are questions of act to be determined by the trial Court. Also it has ong been an established rule of law that where reaonable and impartial persons would reach opposing onclusions as to who contributed to the cause of a articular accident, such question must be left to the rial Court.

Appellant attacks the above findings by arguing hat there is no evidence of excessive speed, and no vidence that Wanless did not maintain a proper ookout or that Wanless was negligent in executing right turn immediately prior to the accident. Apellee will answer appellant's arguments under three uch subdivisions as appellant has set forth its argunent in its opening brief.

Before doing so, however, appellee's counsel conscintiously believes that everything that is stated in ppellant's opening brief is a question of fact to be etermined by the trial Court and were it not for the act that this Honorable Court might believe, if apellee failed to answer, that he concedes to what is tated by appellant, we would not burden the Court vith such a lengthy brief as we are obliged to do nder the circumstances.

Before answering appellant we would like to call o the attention of this Honorable Court rule 52A, Rules of Federal Procedure, which in part reads as ollows:

"Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Also the language used in the following cases:

"The judgment of the lower court which has seen witnesses and heard their evidence is not to be disturbed, except for clear mistake."

Chinn v. Llangollen, 109 Fed. (2d) page 66.

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive. It matters not how convincing the argument is that upon the evidence the findings should have been different."

U. S. v. Tyrakowski, 50 Fed. (2d) 766.

"Findings of fact by court cannot be reviewed if there is not substantial evidence to uphold them."

Federal Life Insurance Co. v. Bailey, 13 Fed. (2d) 113.

"The findings of the trial court are presumptively correct and should not be set aside unless clearly erroneous."

Fitch v. Camille, 106 Fed. (2d) 635.

(a) **Excessive speed.**

Appellant complains that finding V (R.T. 21) "says nothing about how Wanless' speed was excessive". He contends that there was conflict in the testimony offered in this regard. Appellant points out such con-

flict on pages 7 and 8 of its opening brief. Counsel for appellant well knows that in view of such conflict the question of speed was one of fact for the trial Court and that the trial judge had the right to believe the testimony of the appellee that Wanless was driving his automobile at the rate of seventy (70) to eighty (80) miles per hour rather than that of the witness, Wanless, who testified he was traveling between thirty (30) to thirty-five (35) miles per hour, but who could not tell how fast he was traveling at the time of the impact (Tr. p. 285).

> "It was also a question of fact whether under the circumstances defendant's car was being driven at a negligent rate of speed."
>
> *Pollind v. Polich,* 78 Cal. App. (2d) 87 at 90.

See, also:

Greenwood v. Summers, 64 Cal. App. (2d) 516;
Gayton v. Pacific Fruit Express, 127 Cal. App. 50, at 57, 58;
Bellon v. Silver Gate Theatres, Inc. (supra).

Counsel for appellant in his argument completely ignores the physical facts surrounding this particular accident. Proof of the consequences of a collision may be considered by the Court in determining the speed of an automobile involved in an accident.

Asbury v. Goldberg, 8 Cal. App. (2d) 70.

An automobile driven at a reasonable rate of speed does not leave skid marks of one hundred and two (102) feet (Tr. p. 98), nor when it collides with another automobile does it cause the latter to be knocked

back sideways fifteen (15) or twenty (20) feet (Tr. p. 128), nor does it cause the damage as shown in plaintiff's Exhibits 17, 18, 19, 20.

Our Courts have held that proof of speed can be ascertained from the circumstances that attend the collision and consider the distance within which the defendant stopped his car,

Skulte v. Ahern, 22 Cal. App. (2d) 460,

and the length of skid marks on the pavement,

Douglas v. Crabtree, 57 Cal. App. (2d) 568,

or skidding with the brakes set and the wheels locked,

Doyle v. Loyd, 45 Cal. App. (2d) 493.

In fact the Courts have gone so far as to state that evidence of such character may be of greater probative force than the statements of witnesses.

Asbury v. Goldberg (supra).

Appellant also contends that Finding V does not state that "excessive speed was the cause of the accident" because the trial Court did not preface excess speed with the words "careless and negligent". Appellant characterizes the expression of the Court in this regard as a kind of "editorial comment" and argues that Finding V does not state that excessive speed was the cause of the accident.

A reading of Finding V discloses that the trial Court found and enumerated the specific acts and actions on the part of the witness, Wanless, which in its opinion constituted acts of negligence. After specifically enumerating said acts and actions of Wanless in the operation of the Government vehicle, in Find-

ing VII (page 23, Transcript of Record), the Court finds all of the acts and actions of Wanless in the previous finding mentioned to be careless and negligent and the proximate cause of the damages suffered by appellee.

The decisions of our Courts are almost uniform in holding that findings are to be interpreted as a whole and, if possible, so as to uphold the judgment and unless there is an irreconcilable conflict between the findings and the negligence as shown by the evidence, the judgment will be affirmed.

> "If a finding is susceptible of two constructions, one of which supports the judgment and the other does not, the former will prevail; and whenever from the facts found, other facts may be inferred which will support the judgment such inference will be deemed to have been drawn. The findings of fact by the trial Court must receive such a construction as will uphold rather than defeat its judgment."
>
> *Clyde Equipment Co. v. Fiorito,* 16 Fed. (2d) 106, 107.

Where a trial Court's findings fully covered controverted issues of fact, they must stand on appeal, if supported by competent evidence of probative value unless they are clearly erroneous.

> *Lincoln Nat. Life Ins. Co. v. Mathisen,* 150 Fed. (2d) 292.

> "The trial court is not required to make findings of all the facts. It need find only such ulti-

mate facts as are necessary to reach a decision in the case."

Shelly Oil Co. v. Holloway, 171 Fed. (2d) 670, 673.

"Findings of fact should be 'a clear concise statement of ultimate facts and not a statement, report or recapitulation of evidence from which such facts may be found or inferred.' "

Brown Paper Mill Co. v. Quinn, 134 Fed. (2d) 337, 338.

See, also:

American Ins. Co. v. Scheufler, 129 Fed. (2d) 143;

Miller v. Needham, 122 Fed. (2d) 710.

In the case of *Philco v. F. & B. Mfg. Co.,* 170 Fed. (2d) 958, the Court said:

"These are findings of fact based upon evidence produced before the trial court, in part controversial in character. Several witnesses appeared; of their credibility the court had full opportunity to judge as they testified in open court. In such a situation we are not at liberty to disturb the findings of fact unless we can say as a matter of law that the court's interpretation of the evidence is clearly erroneous."

Appellee contends that the last quoted language is most applicable to the facts of the present case and respectfully urges that they fully cover the issues involved and there is no merit whatsoever to the position taken by appellant.

(b) Wanless' lookout.

Appellant contends that Wanless' failure to keep a proper lookout is not given as a cause resulting in the collision. Again appellant's counsel, with nothing but the cold record of this case before him, is asking this Honorable Court to adopt his conclusions taken from the record rather than that of the trial judge who conducted the trial, heard the evidence and observed the witnesses. And again we are confronted with the question of fact based on conflicting testimony.

An examination of the record will disclose that on the day in question, Wanless, a nineteen (19) year old boy (Tr. p. 269), testified he was driving at thirty-five (35) or forty (40) miles per hour (Tr. p. 266), first observed appellee's car one hundred and fifty (150) to one hundred seventy-five (175) feet away. In another instance, Wanless testified that he first saw appellee's car eighty (80) feet from the intersection of Park Avenue and Fremont Street (Tr. p. 267). At that time he was traveling in the outside lane (Tr. p. 276). When he first observed appellee's automobile, appellee's automobile was then "better than half way" into the outside lane (Tr. p. 275). He did not observe the bus being operated by the witness, Hartshorn (Tr. p. 278). He did not observe appellee's extended arm (Tr. p. 278). Wanless had driven over Fremont Street for a period of four (4) months and was familiar with the contour of the highway in the vicinity of Park Avenue and Fremont Street.

We call to the attention of this Honorable Court the above testimony not for the purpose of endeavoring to answer the argument of appellant's counsel in its opening brief, but solely to indicate and show that the question of whether Wanless maintained a proper lookout was a question of fact for the trial Court and that the Court having determined the matter it is now no concern of this Honorable Court, unless this Honorable Court feels that the finding made by the trial Court in this regard has no support in the evidence.

Section 510 of the Vehicle Code of the State of California reads as follows:

> "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Under Section 510 of the Vehicle Code appellee contends, in view of the contour of the road and the inability of Wanless to observe the intersection of Park Avenue and Fremont Street for a greater distance than 150 to 175 feet, it was his duty to regulate and control his automobile accordingly and to maintain a proper lookout. It was his duty under the law to anticipate the possibility of approaching automobiles beyond the point of his vision.

Fleming v. Flick, 140 Cal. App. 14.

(c) Wanless' right turn.

Under this heading appellant again wants this Honorable Court to disregard the findings of the trial Court and examine the photographs introduced into evidence by appellee as plaintiffs' Exhibits 17, 18, 19, and 20, and from its argument draw from said photographs a conclusion different than that reached by the trial Court in this particular case.

Here again, appellant is arguing a purely factual situation. It is not the province of this Court to settle conflicts in the evidence or to determine questions of credibility.

Campana Corporation v. Harrison, 114 Fed. (2d) 400.

> "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as unsupported, the power of the Appellate Court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Crawford v. Southern Pacific Company, supra.

Under the record in this particular case the court could have found that both parties were responsible for this particular accident or that appellee was guilty of contributory negligence. However, the trial Court found that appellee was free from any negligence and appellant was guilty of negligent operation of its

automobile, which was responsible for the accident. If there is any evidence in the record or any reasonable inference to be drawn from such evidence to sustain the finding of the trial Court then this Honorable Court will not disturb those findings.

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2. APPELLEE WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Appellant contends under point 2 of its brief that appellee was guilty of contributory negligence as a matter of law. This contention is based, first, on the photographs of plaintiff's Exhibits 17 to 20, inclusive, which photographs appellant contend show the collision to have been head on and, secondly, that the evidence conclusively established that appellee was violating section 540b of the California Vehicle Code at the time of the accident. The claim, *advanced for the first time on appeal,* that appellee was guilty of contributory negligence as a matter of law *is clearly an afterthought.* Contributory negligence on the part of appellee was pleaded in the answer in general terms. The case was tried upon the theory that any contributory negligence of appellee was a question of fact for the trial Court, just as was the question of any negligence of the appellant. The record will disclose that no motion was made by appellant for a nonsuit at the close of appellee's case. It will be noted that appellant did not contend that any alleged contributory negligence of appellee as a matter of law precluded the case being submitted to the Court

or its decision, nor at any time did appellant urge hat it was entitled to a judgment by reason of appellee's contributory negligence. No mention prior to his appeal was ever made of Section 540b of the California Vehicle Code.

The law is well settled that the question of contributory negligence is ordinarily one for the trial ourt. It is only where the deduction to be drawn om the evidence points unerringly to the negligence f appellee contributing to his own injuries that the uestion becomes one of law. The decisions by the ourts throughout the country are so numerous on his subject that appellee deems citation of authority nnecessary.

The case having been submitted to the Court for ecision and no complaint being made on this appeal s to the admission of evidence, we contend that the etermination by the trial Court was decisive as to he controversy as far as this Honorable Court is conerned. In this regard we call to the Court's attention he following language found in *Lavender v. Kurn*, 27 U. S. 645, 90 Lawyer's Ed. 917, at 923:

> "Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear, but where, as here, there is an evidentiary basis for the jury's verdict, the

jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

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3. THE TRIAL COURT'S AWARD OF DAMAGES WAS NOT EXCESSIVE.

Appellant contends that the damages awarded appellee for his injuries and the death of his wife are excessive. As heretofore stated, although advanced in years appellee, prior to the accident, was a healthy, strong and robust man. As a result of this accident he suffered a fracture of the left wrist and a fracture of the left tibia into the knee joint (Tr. p. 44). X-rays showed the fracture of the left wrist to be a comminuted one (Tr. p. 46) and compacted to a degree (Tr. p. 47). As a result of the fracture appellee's left wrist is now deformed in that the bone protrudes (Tr. p. 213) and that deformity is permanent (Tr. p. 51). Appellee has lost control of his fingers as a result of the wrist injury (Tr. p. 212). The fracture of the wrist left him with a shortening of the bone, with the wrist twisted clear over (Tr. p. 50). Appellee's arm was in a cast for seven (7) months (Tr. p. 212). He was obliged to wear a supporting splint until shortly before the trial (Tr. p. 49). Because of the leg fracture his entire left extremity, from just below the hip, including his knee, ankle and foot,

were immobilized in a splint and kept so for approximately four (4) months (Tr. p. 53). Although a fair union of the leg fracture was accomplished appellee will always have a painful joint (Tr. pp. 53, 54). After the removal of the splint from the leg appellee was obliged to wear an elastic support until a few months prior to the trial (Tr. p. 214). As a result of the fracture the knee joint protrudes and causes appellee pain all the time (Tr. p. 214). Appellee was confined in the hospital from May 11, 1946, to March 24, 1947 (Tr. p. 54). Appellee and his wife, Flora Penders, were very closely and intimately associated during their entire married life. They were married thirty-five (35) years (Tr. p. 216), and during that period of time were together constantly, save and except on one occasion when they were separated for about one month (Tr. p. 216). They were always together and did considerable traveling. Mrs. Penders during her lifetime maintained the household of appellee, giving to him the care and attention of a good and dutiful wife.

An examination of the record reveals that the injuries sustained by appellee were serious and are permanent in nature and that the award of fifteen thousand dollars ($15,000.00) for his disability is not excessive. When one is deprived of the association, care and loving attention of a good and dutiful wife, after thirty-five (35) years of married life, an award of fifteen thousand dollars ($15,000.00) is likewise not excessive.

The responsibility as to the question of excessive damages is primarily with the trial Court and the Appellate Court may not interfere unless the award is so disproportionate to the injuries as to indicate that it was not the result of the cool and dispassionate consideration of the jury.

Holden v. Patten-Blinn Lumber Co., 7 Cal. App. (2d) 220;

Holder v. Key System, 88 Cal. App. (2d) 925.

It must be borne in mind that this award of injuries was given by a trial judge and not by a trial jury, and so appellant is not in a position to complain of sympathy or prejudice. The mere fact that the amount of the award is larger than would have been given by the reviewing Court if the assessment of damages had been within its province is not ground for disturbing the verdict.

Collins v. Jones, 131 Cal. App. 747.

In determining the question of damages the reviewing Court should take into consideration changing conditions in the purchasing power of money.

O'Meara v. Haiden, 204 Cal. 254;

Sim v. Weeks, 7 Cal. App. (2d) 28.

As stated in *Anstead v. Pacific Gas & Electric Co.,* 203 Cal. 634:

> "The verdicts of juries are rarely interfered with upon this ground and only when, as has been repeatedly stated, the verdict is so grossly excessive as to suggest at first blush passion, prejudice or corruption on the part of the jury."

This Honorable Court recently, in the case of *Guthrie v. Southern Pacific,* Action No. 12,164 of said Court, in a decision of this Court written by Judge Pope, held that an Appellate Court had no power to modify a verdict on the ground that it was excessive. Judge Pope stated:

> "There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., as follows: 'The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it * * *' 'A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damages is capable of much more precise ascertainment than it is in a personal injury case.' "

In support of the above quoted language this Honorable Court referred to the following cases:

Feltman v. Sammond, 166 Fed. (2d) 213 (1947, Dist. of Columbia C.C.A.);

Chicago & NW. Ry. v. Green, 164 Fed. (2d) 55 (1947—8th Circ.);

Behrman v. Sims, 157 Fed. (2d) 862 (1946—Dist. Col.);

Herzig v. Swift Co., 154 Fed. (2d) 64 (1946—2nd Circ.);

Reid v. Nelson, 154 Fed. (2d) 724 (1946—5th Circ.).

CONCLUSION.

This case was fully and fairly tried. The trial Court found in favor of appellee and against the appellant. After judgment the appellant did nothing in the way of a motion for new trial, or otherwise, to correct the alleged error that they now urge upon appeal. It is respectfully submitted that no reason exists for disturbing the judgment of the trial Court and that the same may be affirmed.

Dated, San Francisco, California,
May 1, 1950.

Respectfully submitted,
EUGENE H. O'DONNELL,
ROBERT E. HALSING,
Attorneys for Appellee.

No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

FOREWORD.

The "Brief for Appellee" filed in this appeal may be regarded as advancing only two principal contentions:

(1) The Appellate Court has no authority to review findings of fact made by the trial Court. This assertion refers particularly to the trial Court's findings of Appellant's negligence and Appellee's freedom from negligence. (Brief for Appellee, page 9, third paragraph, and pages 6 and 18, *et seq.)*

(2) The damages awarded by the trial Court were not excessive. (Brief for Appellee, page 20.)

We shall discuss these two contentions in the above order.

II.

ARGUMENT.

(1) THE APPELLATE COURT HAS AUTHORITY TO REVIEW FINDINGS WHICH ARE CONTRARY TO THE PHYSICAL FACTS ESTABLISHED BY THE EVIDENCE.

Appellee contends repeatedly throughout his brief that only the trial Court can determine the facts as established by the evidence produced at the trial. Appellee's contention in this respect is based upon the well recognized rule that only the trial Court can judge the credibility of *oral* testimony. We do not dispute the soundness of this rule. We respectfully submit, however, that it is inapplicable to evidence of physical facts, evidence which in this case does not depend on oral testimony and evidence which is directly available to the Honorable Appellate Court.

The Appellee's entire argument proceeds upon the assumption that the principal question raised upon this appeal is whether this Appellate Court is free to reverse the trial Court's findings of fact, which are supported by certain *oral* testimony, although contradicted by other *oral* testimony. This assumption disregards completely the entire burden of Appellant's argument, which is that *physical facts* which contradict oral testimony, compel an Appellate Court to reverse conclusions of law by a trial Court which has disregarded the undisputed physical facts before it. In this case the trial Court ignored completely the undisputed physical facts shown to exist in this case by Plaintiff's Exhibits 17, 18, 19 and 20, being photographs of the physical damage resulting from the ac-

cident in suit. These photographs, as original exhibits transmitted by the trial Court to the appeal Court, are now before the Appellate Court. There can be no question of the credibility of oral testimony involved in a consideration of the physical facts embodied in these photographs. The Appellate Court is legally just as capable as the trial Court to interpret these photographs. We submit these photographs clearly and conclusively establish that contrary to the findings and conclusions of the trial Court the Appellant was not negligent and the Appellee was negligent in this accident.

It is well established that the Federal Appellate tribunal has "untrammeled power to interpret written documents".

> *Eddy v. Prudence Bonds Corp.,* 2 C., 1947, 165 F. (2d) 157 at 163 (opinion by L. Hand, J.), certiorari denied 33 U.S. 845.

In the instant appeal the Honorable Appellate Court has the same untrammeled power to interpret the undisputed documentary evidence embodied in the photographs in evidence as Plaintiff's Exhibits 17 to 20 inclusive. These photographs were admitted in evidence without objection and were never disputed as truly representing physical facts in this collision. (Tr. p. 81.) Moreover, the Honorable Appellate Court, contrary to the Appellee's view (Brief for Appellee, p. 10), in the instant appeal, is in no way bound by the trial Court's conclusions of law regarding negligence. As pointed out in

> *Johnson v. U.S.,* 2 C., 1948, 168 F. (2d) 886,

II.

ARGUMENT.

(1) THE APPELLATE COURT HAS AUTHORITY TO REVIEW FINDINGS WHICH ARE CONTRARY TO THE PHYSICAL FACTS ESTABLISHED BY THE EVIDENCE.

Appellee contends repeatedly throughout his brief that only the trial Court can determine the facts as established by the evidence produced at the trial. Appellee's contention in this respect is based upon the well recognized rule that only the trial Court can judge the credibility of *oral* testimony. We do not dispute the soundness of this rule. We respectfully submit, however, that it is inapplicable to evidence of physical facts, evidence which in this case does not depend on oral testimony and evidence which is directly available to the Honorable Appellate Court.

The Appellee's entire argument proceeds upon the assumption that the principal question raised upon this appeal is whether this Appellate Court is free to reverse the trial Court's findings of fact, which are supported by certain *oral* testimony, although contradicted by other *oral* testimony. This assumption disregards completely the entire burden of Appellant's argument, which is that *physical facts* which contradict oral testimony, compel an Appellate Court to reverse conclusions of law by a trial Court which has disregarded the undisputed physical facts before it. In this case the trial Court ignored completely the undisputed physical facts shown to exist in this case by Plaintiff's Exhibits 17, 18, 19 and 20, being photographs of the physical damage resulting from the ac-

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> *Johnson v. U.S.,* 2 C., 1948, 168 F. (2d) 886,

a Federal Tort Claims Act decision, in a negligence action tried to the Court whether facts found show negligence, presents a question of law in respect to which the reviewing Court is not bound by the trial Court's conclusions, though, of course, the latter's conclusions may be persuasive in the absence of their being clearly erroneous.

Appellant respectfully submits that in this appeal the trial Court's conclusions of law that Appellant was negligent and that Appellee was *not* guilty of contributory negligence, are clearly erroneous in view of the undisputed physical facts evidenced by Plaintiff's Exhibits 17, 18, 19 and 20. Because these exhibits picture the physical facts of a head-on collision, they contradict the oral testimony of Appellee's witnesses that Appellee was completing a legal and proper lefthand turn when struck by Appellant. (Brief for Appellee, pp. 18 to 20, inc.) In the face of these physical facts contradicting Appellee's oral testimony, this Honorable Appellate Court has no choice but to disregard the oral testimony.

Numerous decisions of the State and Federal Appellate Courts have recognized the rule that physical facts contradicting oral testimony shall prevail. See, among the State decisions:

Borcth v. Kisselman, 1929, 7 New Jersey Misc. 922, 146 A. 683,

(involved photographs showing physical facts contrary to oral testimony.)

Federal decisions supporting Appellant's position include:

F. W. Woolworth v. Davis, 10 C., 1930, 41 F. (2d) 342 at 347,

an elevator accident case wherein plaintiff's theory of accident was contradicted by physical facts. The Court ruled that oral testimony contradicted by physical facts cannot be credited by Court or jury.

Chambers v. Skelly Oil, 10 C., 1937, 87 F. (2d) 853, especially 856,

a vehicle accident case in which photographs established physical facts contrary to oral testimony.

Bash v. B. & O. R. Co., 3 C., 1939, 102 F. (2d) 48,

a railroad crossing case in which plaintiff was denied recovery despite favorable oral testimony because physical facts made plaintiff's theory untenable.

An interesting review of this "incontrovertible physical facts rule" is set forth in dissent of Miller, J., in

Baltimore & O. R. v. Postom, U.S.C.A. District of Columbia, 1949, 177 F. (2d) 53, commencing at 59.

Although the *B. & O. v. Postom* factual situation is very different from the case at bar, Judge Miller's dissent is valuable for its comprehensive analysis of the physical facts doctrine and fulsome citation of decisions applying the doctrine.

ferring to him as "advanced in years". *(Ibid.)* Nowhere, however, does Appellee's obviously low life expectancy enter into the calculation of damages which Appellee contends are not excessive.

It is equally true that Appellee omits any reference to his deceased wife's low life expectancy in his contention that damages arising from her death are not excessive. (Brief for Appellee, p. 21.)

It is respectfully submitted that as well as all of the factors pointed out in Appellant's Opening Brief as indicating excessive damages in this case, the damages here awarded cannot be allowed because they are irreconcilable with the obviously low life expectancy of Appellee and his deceased wife. Life expectancy, together with a plaintiff's gainful employment record, are unquestionably factors to be considered in assessing damages, according to decisions of this Court. It is Appellant's opinion that the trial Court's failure to consider either the life expectancy or employment record of Appellee constitutes reversible error.

Since Appellee evidently places great reliance upon this Honorable Court's decision in

Guthrie v. Southern Pacific, 9 C., 1949, 180 F. (2d) 295,

we shall confine ourselves to a discussion of this decision. Analysis of the *Guthrie* case readily discloses how widely separated it is from the case at bar. At the outset the *Guthrie* case involved a verdict—not, as here, a Court award of damages. Moreover, the *Guthrie* case involved violent, disabling and perma-

nent injuries to a 59-year-old man, while the instant case deals with injuries of slight extent, which cannot be regarded as seriously disabling to the octogenarian Appellee. We ask the Honorable Court to compare the excruciating "phantom pain" of Guthrie plaintiff amputee (supra 303, *et seq.*) with Appellee's deformed wrist (Tr. p. 51) and painful knee joint. (Tr. p. 53, 54.)

Entirely apart from the patently great physical differences between the plaintiff in the *Guthrie* case and the Appellee, it is at once apparent that from a legal standpoint the *Guthrie* decision is firmly based upon the very two factors which the trial Court in the case at bar omitted entirely, namely, life expectancy and impaired earning capacity. The *Guthrie* opinion expressly refers to the plaintiff therein as having a life expectancy of eleven years and an established earning capacity of nearly $6000 a year. (Supra, at 302.) In the instant case no showing whatsoever was made of the life expectancy of either Appellee or his deceased wife, nor was there any showing of Appellee's expected loss of earnings.

In the case of life expectancy we must conclude that no evidence was offered because Appellee and his deceased wife had, from the standpoint of damages, embarrassingly low life expectancies. Appellee, aged seventy-nine at time of injury (Tr. p. 71), had a life expectancy of 5.38 years, while his deceased wife, at that time seventy-seven years old *(Ibid.),* could reasonably expect to live only 6.07 years. (Commissioner's

Standard Ordinary Mortality Table, 58 *Corpus Juris Secundum* 1212.)

On the score of loss of earnings, it appears plain that Appellee suffered no damage and therefore presented no evidence of lost earnings, because he was retired. (Appellant's Opening Brief, p. 31.)

In summary, we conclude that applying the *Guthrie* case analysis to the case at bar, Appellee's recovery in the trial Court was excessive, as a matter of law, in view of his low life expectancy as well as that of his deceased wife, and in view of his failure to show any impaired earning power resulting from the accident.

In fairness to the opinion of Judge Pope, Appellant deems it appropriate to point out, as this Honorable Appellate Court well knows, that the *Guthrie* decision was *not* unanimous. Appellee's quotation from Judge Pope (Brief for Appellee, p. 23) overlooks the forceful criticism by Judge Pope of the "doctrine of impotence" followed by some Federal Appellate Courts in reviewing questions of excessive damages (supra at 306). We concur heartily with Judge Pope's dissenting criticism and would urge this Honorable Appellate Court to assert the power of review asserted by it in

Cobb v. Lepisto, 9 C., 1925, 6 F. (2d) 128

and

Dept. of Water & Power of Los Angeles v. Anderson, 9 C., 1938, 95 F. (2d) 577.

III.

CONCLUSION.

For the foregoing reasons, Appellant earnestly requests that the Honorable Appellate Court reverse the judgment of the trial Court herein.

Dated, San Francisco, California,
May 12, 1950.

Respectfully submitted,
FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

No. 12426.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY D. LECKAS,

Appellant,

vs.

CATALINA ISLAND STEAMSHIP LINE,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

OPENING BRIEF.

This is an appeal in Admiralty from the portion of a final decree in favor of respondents in the United States District Court for the Southern District of California, Central Division, in an action for wages and maintenance. Appellant sustained injuries on a sidewalk in front of respondents' dock on the 8th day of November, 1946, to the 22nd day of January, 1947, as the result of the injuries sustained and remained an out-patient and was disabled by reason of said injuries from said 22nd day of January, 1947, to and including the 13th day of April, 1947.

The pleadings in the District Court were:

(a) Libel *in Personam* for Wages, Maintenance and Cure [Ap. 5]; Answer of Catalina Island Steamship Line, a corporation [Ap. 10].

A trial was had before United States District Court with the Hon. Wm. C. Mathes, Judge Presiding. After hearing the evidence, oral testimony and written documents, proctors for libelant and respondent argued the case. The Honorable Judge then found in favor of the libelant upon the issue of maintenance and in favor of the respondents upon the issue of wages during the period of libelant's disability.

On the 26th day of July, 1949, the Honorable Judge then made his Order allowing libelant his maintenance but failed to make any finding on the question of wages [Ap. 40], thereafter on the 3rd day of October, 1949, a further argument was had before the Hon. United States District Judge by proctors for libelant and respondent and at said time further evidence was taken and further stipulations were entered into by and between the parties to said action and thereupon the matter was submitted and the Hon. United States District Judge made his Findings of Fact and Conclusions of Law and signed the same on said 3rd day of October, 1949 [Ap. 42].

A Final Decree was signed on the 3rd day of October, 1949 [Ap. 46].

The Apostles on appeal certified by the Clerk of the District Court, in addition to the pleadings and orders

hereinabove set forth, include the following: Assignment of Errors [Ap. 48]; Petition for Appeal without furnishing bonds or prepayment of or Order Allowing Appeal without furnishing Bond or Costs [Ap. 51]; making deposit to secure fees or costs [Ap. 50]; Notice of Appeal and Affidavit of Mailing thereof [Ap. 52]; Praecipe [Ap. 54]; Assignment of Errors [Ap. 55]; Petition for Cross-Appeal [Ap. 57]; Order allowing Cross-Appeal [Ap. 58]; Notice of Cross-Appeal and Affidavit of Mailing thereof [Ap. 59]; and Notice of Filing Bond on Appeal [Ap. 61].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and Maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and Maritime jurisdiction was vested in the District Courts of the United States by an Act of Congress on June 25, 1948, U. S. C. A., Section 1333.

Appeals from final decrees in Admiralty are authorized by Section 128-a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A., Section 225) providing that the Court of Appeals shall have appellate jurisdiction to review by appeal, final decisions.

Statement of the Case.

On the 2nd day of July, 1946, libelant was employed as an oiler on board the U. S. "CATALINA" at Wilmington, California, for a coast-wise voyage and received certificate of discharge from said voyage on the 9th day of November, 1946, immediately after he sustained an injury that prevented him from continuing on such voyage [Ap. 35] [R. Tr. 4, 5 and 6] [Libelant's #3, Ap. 35].

The S. S. "CATALINA" made daily runs from Wilmington to Avalon, Catalina Island, and return. During the summer months the libelant would report for duty on his vessel at 6:00 A. M. every other day. On alternate days he would report at 8:00 A. M. [R. Tr. 26]. After Labor Day, he would report for duty on the vessel at 8:00 A.M. [R. Tr. 26 and 30]. The vessel returned to Wilmington at approximately 6:00 P. M. [R. Tr. 24]. The libelant had one day off each week [R. Tr. 21], and was paid his wages twice a month, on the 5th and 20th day of each month [R. Tr. 22].

On the day of the accident, libelant had just completed assisting shutting down the plant of the S. S. "CATALINA" and left her a little after 6:00 o'clock P. M. [R. Tr. 30]. He walked across the dock at which the vessel was moored and unto a sidewalk adjacent thereto, when he was struck by a hit-and-run automobile that ran upon the sidewalk inflicting his injuries. At the time libelant was on his way home for the night [R. Tr. 27]. [Libelant's #2, Ap. 34.]

Libelant was confined to a hospital from the 8th day of November, 1946, to and including January 22, 1947, for the treatment of the injuries sustained by him on November 8th, 1946 [R. Tr. 5].

Libelant returned to his work in the employ of respondents on April 14, 1947 [R. Tr. 5 and 6].

Libelant was a member of a Union which had a contract with respondent covering wages, hours and other conditions of employment. [Libelant's Exhibit #1, Ap. 17; R. Tr. 9, 10 and 11].

Edward Leroy Mussetter, the master of the S. S. "CATALINA" testified that orders to replace crew members were placed through a Hiring Hall and it was specified whether the man desired was to be for relief or a steady man [R. Tr. 39].

From the evidence the District Court found that the libelant was employed on the S. S. "CATALINA" as a permanent employee [Ap. 43], and the Court found that libelant was in the service of his vessel when he received the injuries complained of on November 8, 1946 [Ap. 44]. The Court further found that the libelant was hospitalized from November 8, 1946, to and including January 22, 1947, and was an outpatient from the 22nd day of January, 1947, to and including the 13th day of April, 1947, and on the 14th day of April, 1947, was able to return to his former employment with the respondent [Ap. 44].

The Court found and concluded that libelant was entitled to maintenance for the period of 81 days at the rate of $4.50 per day and that respondent was entitled to a credit in the sum of $200.00 which was paid to libelant for a lease [Ap. 44; R. Tr. 76]. The Court concluded and found that libelant was not entitled to recover wages for any period during which he was disabled by reason of the injury sustained in the service of his vessel [Ap. 44].

Assignment of Errors.

The assignment of errors upon which the appellant relies are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal.

a. The District Court erred in denying appellant full wages during the entire period he was disabled by reason of the injuries sustained by him while in the service of the ship operated by respondent, Catalina Island Steamship Line, a corporation.

b. The District Court erred in not finding that appellant was entitled to recover wages in the sum of $3,799.88 for the period of November 9, 1946, to and including the 13th day of April, 1947.

Outline of Argument.

I. This appeal is a trial *de novo*.

II. Appellant is entitled to recover his wages from the 9th day of November, 1946, to and including the 13th day of April, 1947.

ARGUMENT.

I.

This Appeal is a Trial De Novo. No Authority Is Necessary to Establish This Point on the Ninth Circuit.

II.

Appellant Is Entitled to Recover Full Wages During the Period of His Disability.

There is no dispute as to the pertinent facts. Appellant had been employed on the S. S. "CATALINA" as an oiler since the 2nd day of July, 1946, until the date of his injury on November 8 of the same year. The S. S. "CATALINA" made daily trips from Wilmington to Avalon and return. Appellant was in the immediate vicinity of the dock at which the S. S. "CATALINA" was moored when he sustained his injuries.

The law applicable to the case is well settled. In *The Osceola,* 189 U. S. 159, the Court stated:

> "Upon a full review, however, of English and American authorities upon these questions we think the law may be considered as settled upon the following propositions:
>
> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued . . ."

This case has been consistently followed down to the present date.

O'Donnell v. Great Lakes Dredge Co., 127 F. 2d 901;

Mason v. Evanisevich, 131 F. 2d 858;

Pacific Mail S. S. Co. v. Lucas, 264 Fed. 938;

Longstreet v. Steamboat S. S. "Springer," 4 Fed. 671;

Jones v. Waterman S. S. Corp., 155 F. 2d 992, 996.

See, also:

Farrell v. U. S. A., 336 U. S. 511.

Particularly applicable to the present case is the decision in *Enochsson v. Freeport Sulphur Co.,* 7 F. 2d 674. In that case Enochsson was a member of the crew of the "FREEPORT SULPHUR No. 1" on coastwise articles for a term not to exceed six calendar months. A number of trips were made by the "FREEPORT SULPHUR No. 1" shuttling back and forth between the same ports. The court held that the employment did not terminate at the end of one particular passage to a particular port and return but for the full period of the contract.

There can be no question that appellant was employed during the seasonal operation of the S. S. "CATALINA" to which vessel he returned as soon as he had recovered from his injury. The Court found that appellant was a steady employee and thus it was bound to award wages for the duration of the employee's contract. The failure of the Court to award wages to appellant is inconsistent with the findings as to his employment.

Conclusion.

It is respectfully submitted that appellant herein is entitled to recover his full wages from November 9, 1946, to and including the 13th day of April, 1947, and that the decree of the United States District Court herein denying the wages to appellant should be reversed.

Respectfully submitted,

David A. Fall,

Proctor for Appellant.

APPENDIX.

I.

The District Court erred in finding that it is not true that by reason of the premises of its findings of fact that libelant is entitled to recover wages from respondent herein from the 9th day of November, 1946, to the 13th day of April, 1947.

II.

The District Court erred in not finding that the libelant was entitled to recover his full wages during the entire period of his disability from the 9th day of November, 1946, to and including the 13th day of April, 1947.

III.

The District Court erred in not finding that the libelant was entitled to recover from respondent his wages from the 9th day of November, 1946, to and including the 26th day of June, 1947, in the sum of $3,799.88.

IV.

The District Court erred in not finding that the libelant was entitled to recover his wages during the period of time that he was disabled and incapacitated from work as the result of injuries sustained while in the service of the S. S. "Catalina."

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vs.

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Cross-Appellee.

Brief of Appellee and Cross-Appellant Catalina Island Steamship Line.

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APPELLEE'S BRIEF.

Preliminary Statement.

Appellee will answer appellant's opening brief and under separate headings will then present its points in support of its cross-appeal.

Appellee does not believe that the appellant has set forth a sufficient statement of the case to give the Court the entire picture involved on these appeals. Appellee does not agree that appellant's "Statement of the Case" is complete and will set forth its own view of the record.

Statement of the Case.

From the time the libelant became employed by the Catalina Island Steamship Line, then known as Wilmington Transportation Company, up to and including the day he sustained his injury, he was at all times a member of the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association. [Rep. Tr. p. 10.]

A contract between the union of which the appellant was a member and the respondent was offered in evidence as Libelant's Exhibit 1. [Rep. Tr. p. 9.] It was agreed by libelant that said contract "sets forth the terms of the employment." [Rep. Tr. p. 22, lines 10-12.]

The written contract is in two sections. The original agreement which became effective October 15, 1945, appears in the Apostles commencing at page 22. An amendment thereof appears in the Apostles commencing at page 18 and this amendment provides that it was effective as of July 1, 1946, with an expiration date of December 31, 1946, or thereafter on due notice.

No evidence was introduced showing that this contract was continued in force after December 31, 1946.

The contract provided for a "daily rate of pay" in so far as the employees covered by the agreement are concerned and with particular reference to an oiler, the daily rate of pay was fixed at $10.88. Overtime work between 8 A. M. and 5 P. M. any day was to be paid at the rate of $1.50 per hour. Overtime work between 5 P. M. and 8 A. M. was to be paid for at the rate of $1.70 per hour.

The contract and the amendment thereof were executed at Wilmington, California. [Ap. pp. 33 and 20.]

It was stipulated that on November 8, 1946, the libelant, upon completing his work for that day aboard the SS Catalina, left the vessel, proceeded through the premises occupied by the respondent and known as the Terminal Building, and entered a public street in Wilmington known as Water Street, crossed the street car tracks which are located north of the building occupied by the respondent as a terminal, and got upon the public sidewalk on Water Street, turned to the west and was walking down the sidewalk in a westerly direction, at which time he was struck by an automobile; and that as a result of that accident libelant sustained bodily injuries and was confined to the San Pedro Hospital and the McCornack General Hospital from the 8th day of November, 1946, and then again in the San Pedro Hospital, after having been confined in the McCornack General Hospital, and was discharged from the San Pedro Hospital on the 22nd day of January, 1947. [Rep. Tr. p. 4, line 21, to p. 5, line 20.]

It was stipulated that Libelant's Exhibit 2 depicts the physical situation existing on the day of the accident. At the bottom is a diagram purporting to represent the SS Catalina and then on the land side of the Catalina are the premises occupied by the respondent. The space north of the premises shows the public street. The path of Mr. Leckas appears on the diagram, showing how he got to the place where he was hurt. [Rep. Tr. p. 11, line 24, to p. 12, line 10.]

It was stipulated that the libelant was never served any meals aboard the vessel. [Rep. Tr. p. 15, lines 15-17.]

It was stipulated that the voyage of the SS Catalina, the vessel involved, between Los Angeles Harbor and Catalina Island, is a coastwise voyage; that the vessel is

to be treated as a coastwise vessel and that each voyage is a coastwise voyage. [Rep. Tr. p. 16, line 21, to p. 17, line 6.]

Libelant had been employed on the SS Catalina through a hiring hall. [Rep. Tr. p. 17, lines 15-25.]

Libelant received his pay twice a month, on the 5th and the 20th of each month. [Rep. Tr. p. 22, lines 14-17.]

The men in the engine room crew leave the vessel as soon as they shut down the plant. Every evening the plant is shut down. As soon as the plant is shut down everybody leaves the ship. [Rep. Tr. p. 24, line 4, to p. 25, line 4.]

In June of 1946 the libelant lived at 484 West Third Street, San Pedro, and had lived there since May 29, 1946. During the time when he was working aboard the Catalina he was not furnished any meals aboard the vessel and wasn't furnished any sleeping quarters. Each day when he finished his work he went home. [Rep. Tr. p. 28, lines 2-15.]

Libelant went down to the vessel at 8 o'clock in the morning as a regular thing unless the engineer told him the night before to come back at 6 A. M. He received overtime for the two hours between 6 A. M. and 8 A. M. on those days when he was told to come down early. He also received overtime for all work performed after 5 o'clock P. M. On one day during each week libelant didn't do any work at all and didn't go down to the vessel on that day. [Rep. Tr. p. 29, lines 5-25.]

Libelant's hours at the time of the accident were from 8 A. M. to 12 noon and from 1 P. M. to 5 P. M. He happened to be on the watch which brought the ship back

to the mainland at that time. That was the reason he was shutting the plant down. [Rep. Tr. p. 30, lines 11-16.]

There was never a day when libelant was called from his home at night to come down to the ship. [Rep. Tr. p. 31, lines 9-11.]

During all the time libelant was working aboard the Catalina he supported himself by providing his own lodging and purchased all food out of his earnings. [Rep. Tr. p. 33, lines 4-8.]

Respondent's Exhibit A [immediately following Apostles p. 35] is a report of ship personnel not shipped or discharged before a United States Shipping Commissioner and covers voyages of the SS Catalina from No. 4864 to No. 4889.

Edward Mussetter, the master of the SS Catalina, testified without contradiction or conflict, that the figures "4864 to 4889" shown on Respondent's Exhibit A covered twenty-five or twenty-six *separate* voyages. [Rep. Tr. p. 36, lines 7-24.]

During the time Edward Mussetter was master of the SS Catalina the crew members did not at any time sign any articles of any kind pertaining to the vessel. The only papers they ever signed were their social security and unemployment insurance papers. When the SS Catalina was tied up at the dock at Wilmington at the end of each voyage, the crew members never asked permission from the master to go ashore. [Rep. Tr. p. 37, lines 12-21.]

It was stipulated that from May 18, 1946, to November 8, 1946, libelant earned basic wages of $10.88 per day which with overtime amounted to $2,204.22; that he was paid for 121 meals at one dollar per meal, amounting to

gross earnings of $2,325.22; that income tax withheld amounted to $358.25, state unemployment insurance withheld amounted to $23.26, federal old age insurance amounted to $23.26, and that his net earnings were $1,920.45. [Rep. Tr. p. 41, line 24, to p. 42, line 8.]

L. H. Connor, Operating Manager of the respondent, testified that when the vessel left Wilmington in the morning and then got back in the evening the company had no intention of sending the vessel out on more voyages or trips. [Rep. Tr. p. 43, lines 16-20.]

A stipulation with reference to this situation is shown by the following portion of the record:

> "Mr. Gallagher: On any day. What I am trying to prove, your Honor, is simply this: They have a schedule. When both ships were operated they left at a certain time and they were supposed to get back at a certain time. When they were back and docked there wasn't any other work for the ship to do. In other words, nobody would show up with freight or they wouldn't take passengers any place. It was just over in the morning and back in the afternoon, and that was the end of it.
>
> The Court: There is nothing to do until tomorrow, ordinarily?
>
> Mr. Gallagher: That is right.
>
> The Court: There is no issue about that?
>
> Mr. Fall: There is no issue about it, no. I mean, I would stipulate that was the fact.
>
> The Court: You stipulate this vessel carried both passengers and freight?
>
> Mr. Fall: Yes.
>
> Mr. Gallagher: Yes, your Honor.

The Court: Normally, as I understand your position, it is that once the ship ties up on the return trip in the evening of any given day, there is no business contemplated until the next morning.

Mr. Fall: That is correct.

Mr. Gallagher: That is correct, your Honor." [Rep. Tr. p. 43, line 23, to p. 44, line 22.]

Outline of Argument.

Appellee will argue in this section of the brief only the proposition that the libelant is not entitled to recover wages from the 9th day of November, 1946, for any period of time thereafter.

ARGUMENT.

POINT I.

Appellant Is Not Entitled to Recover Wages During the Period of His Disability.

The first important proposition involved is the failure of the libelant to prove that the SS Catalina was actually in operation at any time subsequent to November 30, 1946. Respondent's Exhibit A might suffice as proof of the fact that the vessel operated up to and including November 30, 1946, but does not constitute proof that the vessel was operated thereafter during the period within which the libelant claims wages.

The second important proposition is that in the Assignments of Error the appellant claims that

> "the district court erred in not finding that the libelant was entitled to recover from respondent, wages from the 9th day of November, 1946 to and including the 26th day of June, 1947, in the sum of $3,799.88." (Appendix, App. Op. Br. par. III.)

The uncontradicted evidence shows that the libelant was re-employed on the 14th day of April, 1947. The elapsed time between May 18, 1946, and November 8, 1946, was 171 days. The uncontradicted evidence, consisting of a *stipulation,* was that the gross amount of actual earnings by the appellant consisting of basic wages at $10.88 per day plus overtime, was the sum of $2,204.22 from May 18, 1946, to November 8, 1946.

The elapsed time between November 8, 1946, and April 13, 1947, is 157 days. This would be slightly in excess of 22 weeks and if the libelant had proved, which he did not, that he would have been employed six days of each week during said 22 weeks, he would have earned basic wages of $65.28 per week or a total of $1,436.16. The libelant would certainly not be entitled to overtime on some conjectural basis and neither would he be entitled to subsistence of a dollar per meal for the simple reason that while he was actually working he was allowed this one dollar solely because of the fact that he had missed a meal on 121 days of the total number of days he worked between May 18, 1946, and November 8, 1946.

The appellant has certainly failed to support his Assignment of Error No. III.

Appellee respectfully contends, in view of the fact that the contract between the union and the respondent is a California contract, that the law of California will prevail in construing said contract.

Pursuant to the provisions of Section 3001 of the Labor Code of California

> "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to

be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term."

Section 3002 of the same code provides

"in the absence of any agreement or custom as to the term of service, the time of payment, or the rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed."

Section 3003 of the same code provides that

"if after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service."

The evidence shows, without conflict, and is supported by stipulation and agreement of the parties, that on each day there was a separate and distinct voyage of the SS Catalina. The written contract provides for wages at a daily rate.

Pursuant to the provisions of the written contract between the union and the respondent, there was no obligation of any kind or character imposed upon the appellant to perform any kind of work or labor for the respondent for any period in excess of one day and there is likewise no obligation on the part of the appellee to employ the appellant for more than one day. The appellant could have quit at the end of any particular day and voyage without violating any provision of the contract and the same privilege was accorded the appellee in that it could have discharged the appellant at the end of any particular day and voyage.

Contrasted with the foregoing situation is the usual agreement contained in shipping articles where a seaman binds himself for a particular voyage, the extreme length of time of such voyage usually being stated. If a seaman is employed on a coastwise voyage from Los Angeles to Seattle and return he, of course, is entitled to retain his employment in the absence of misconduct until the coastwise voyage is completed and the same is true with reference to foreign voyages. Such contracts are sometimes cast in the form referred to in the case which appellant seems to rely upon in support of his contention.

In the case of *Enochsson v. Freeport Sulphur Co.*, 7 F. 2d 674, the shipping articles provided as follows:

> "It is agreed between the master and the seamen or mariners of the steamship Freeport Sulphur No. 1, New York, of which C. G. Haslund is at present master, or whoever shall go for master, now bound from the port of Freeport, Texas, to Tampico, Mexico, and return: also trading to or between the United States and the Republic of Mexico or the West Indies as the master may direct, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States *for a term of time not exceeding six calendar months.*" (Emphasis added.)

It is at once apparent from the provisions of the articles that the libelant referred to in said case, who was signed as third mate, bound himself to serve the vessel for at least six months.

In *Mason v. Evanisevich*, 131 F. 2d 858, the seaman had been employed for a fishing season.

There is nothing in the written contract involved in the case at bar which specifies that the appellant was to be employed for any period of time beyond a day.

The appellant contends, at the bottom of page 8 of his opening brief, that

> "there can be no question that appellant was employed *during the seasonal operation* of the SS 'Catalina' to which vessel he returned as soon as he had recovered from his injury."

There is considerable question about this contention made by the appellant, particularly in view of the fact that he does not refer to any evidence or any portion of the contract which supports his gratuitous statement.

The appellant in the case at bar was free to do as he pleased from the time he left the vessel until the time he reported for duty the next morning. There is absolutely nothing in the written contract which requires him to obtain shore leave.

It is true that the trial court found that

> "the respondent herein employed the libelant as an oiler upon the SS 'Catalina' as a *permanent* employee at wages in the sum of $10.88 per day, overtime, and one dollar per day subsistence, on a six day per week basis." [Ap. p. 43.]

But this Court is not bound by any finding made by the trial court in an admiralty case and this is particularly true when a finding is not supported by substantial evi-

dence. It is also the law as it is understood by appellee that this Honorable Court is not bound to accept a finding made by a trial court in an admiralty case if the evidence on the subject is uncontradicted so that there is no question of credibility of witnesses involved.

Appellant also contends that the fact that the trial judge found he was "a permanent employee" means that he was on the pay roll *ad infinitum.*

It is respectfully contended by appellee that the appellant has not shown any good reason upon which the decree of the trial judge to the effect that the appellant was not entitled to wages should be reversed or interfered with. Judge Mathes gave this matter careful consideration and appellee respectfully contends that the decision and decree of the trial court with reference to wages was correct and in strict accordance with the applicable law.

CROSS-APPELLANT'S BRIEF.

In accordance with the suggestion made by the Clerk of this Honorable Court in his letter under date of December 23, 1949, the reply brief of the appellee and its brief as cross-appellant are incorporated under one cover.

Preliminary Statement.

Cross-appellant, by reference thereto, incorporates herein that portion of appellant's opening brief set forth on pages 2 and 3, with the same effect as though repeated *verbatim* here.

Statement of the Case.

Cross-appellant incorporates, by reference thereto, its "Statement of the Case" contained in its Reply to Appellant's Opening Brief, and in addition thereto sets forth the following:

The trial court found that prior to the 8th day of November, 1946,

> "respondent herein employed the libelant as an oiler upon the SS 'Catalina' as a permanent employee at wages in the sum of $10.88 per day, overtime, and one dollar per day subsistence, on a six day per week basis." [Ap. p. 43.]

The trial court also found

> "that on the 8th day of November, 1946, (while) libelant was leaving the premises of the respondent, at Wilmington, California, and in the service of his vessel, (he) was struck by an automobile inflicting injuries upon him. . . ." (Matter in parentheses added for the reason that the omissions are no doubt typographical errors.) [Ap. pp. 43-44.]

The trial court also found

> "that libelant is entitled to recover maintenance for a period of 81 days at a rate of $4.50 per day all to the sum of $364.50 on account of which respondent, on February 27, 1947, paid to libelant the sum of $200.00." [Ap. p. 44.]

Assignment of Errors.

The Assignment of Errors upon which the cross-appellant relies are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in the cross-appeal.

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE CROSS-APPELLEE WAS EMPLOYED AS A PEAMANENT EMPLOYEE, THAT HE WAS INJURED WHILE LEAVING THE PREMISES OF RESPONDENT AND WAS IN THE SERVICE OF HIS VESSEL AT THE TIME HE WAS STRUCK BY AN AUTOMOBILE.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE LIBELANT WAS ENTITLED TO RECOVER MAINTENANCE IN ANY SUM WHATSOEVER.

III.

THE DISTRICT COURT ERRED IN CONCLUDING THAT LIBELANT IS ENTITLED TO RECOVER FROM RESPONDENT THE SUM OF $164.50 AND HIS COSTS OF COURT.

Outline of Argument.

1. This appeal is a trial *de novo.*

2. Cross-appellee was not entitled to recover any maintenance.

3. Cross-appellee was not employed as a permanent employee but was employed on a daily basis. Each day there was a complete voyage and the cross-appellee had concluded all of his services and was not subject to the call of duty and was therefore not entitled to any maintenance whatever. He was not leaving the premises. He had left the premises and was on a public sidewalk.

ARGUMENT.

I.

This Appeal Is a Trial De Novo.

This Honorable Court has rendered so many decisions holding that an admiralty appeal is a trial *de novo* that citation of authority is unnecessary to establish this contention.

II.

The Evidence Does Not Support the Finding That Libelant Was a Permanent Employee of Respondent.

The written contract pursuant to which the cross-appellee became an employee of the cross-appellant has been referred to in that portion of this brief answering the contentions of the appellant. In the interests of brevity it seems unnecessary to repeat what has been said with reference to that contract, its legal effect, and the statutes of the

State of California applicable thereto. For that reason the argument set forth in appellee's reply brief is by reference thereto incorporated herein.

Cross-appellant earnestly suggests that the finding made by the learned trial judge with reference to the proposition that "respondent herein employed the libelant as an oiler upon the S.S. 'Catalina' as a permanent employee" was an inadvertence. Certainly the trial judge did not intend to make any such finding. However the fact is that the finding appears in the record and cross-appellant therefore contends that there is absolutely no evidence in the record which will support this finding. The contract shows that the cross-appellee was employed on a daily basis. The entire proposition is, in the final analysis, left to the sound discretion of this Honorable Court trying this case *de novo*. This particular finding should be corrected by this Honorable Court by striking out the word "permanent" and also striking out the words "on a six day per week basis."

In all probability the libelant did work approximately six days of each week between May 18, 1946, and November 8, 1946, but that fact does not establish his contention that he was employed on a weekly basis or on a permanent basis. As a matter of law there could not be an employment on a "permanent" basis. "Permanent" means forever.

III.

The Evidence Does Not Support the Findings of the Trial Court That the Cross-Appellee Is Entitled to Maintenance.

It is well settled that whenever a seaman is injured in the service of his vessel he is entitled to maintenance until a maximum degree of cure is effected. Cross-appellant respectfully contends that this rule does not mean that a seaman employed on the basis upon which cross-appellee was employed and who was completely free of all possible duties to the vessel from the time he left it each night until he got back in the morning is entitled to be maintained at the expense of the vessel when he is struck by a hit-and-run driver on a public sidewalk. There is no question with reference to any period of recreation involved in this case. Neither is there any proposition involving shore leave. The cross-appellee had his own home and went there every night.

It is respectfully contended that the United States Supreme Court went about as far as any court should go with reference to the question of maintenance in the case of *Aguilar v. Standard Oil Co.,* 318 U. S. 724, 87 L. Ed. 1107. There is, however, nothing in that decision which supports an award of maintenance to a man in the status of cross-appellee. In all of the cases with which cross-appellant is familiar, the seamen who have been awarded maintenance have been employed on a 24-hour basis for periods of time extending from the beginning of the term of employment to the end thereof. That situation does not exist in the case at bar.

Conclusion.

It is respectfully contended that the decree denying wages should be affirmed and the decree awarding maintenance to the cross-appellee should be reversed.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellee and Cross-Appellant, Catalina Island Steamship Line.

APPENDIX.

I.

The evidence is insufficient to support the finding that prior to the 8th day of November, 1946, respondent herein employed the libelant as an oiler upon the S.S. "Catalina" as a permanent employee.

II.

The evidence is insufficient to support the finding that the respondent employed the libelant as a permanent employee.

III.

The evidence is insufficient to support the finding that the respondent employed the libelant at wages in the sum of $10.88 per day and $1.00 per day subsistence.

IV.

The evidence is insufficient to support the finding that libelant's rate of pay included, or that he was paid in addition to the daily wage of $10.88, $1.00 per day subsistence.

V.

The evidence is insufficient to support the finding that on the 8th day of November, 1946, libelant was leaving the premises of the respondent at Wilmington, California, and in the service of his vessel was struck by an automobile.

VI.

The evidence is insufficient to support the finding that libelant was injured while leaving the premises of the respondent at Wilmington, California.

VII.

The evidence is insufficient to support the finding that libelant was struck by an automobile while libelant was in the service of his vessel.

VIII.

The evidence is insufficient to support the finding that libelant is entitled to recover maintenance for a period of 81 days or for any number of days, or at all.

IX.

The findings and conclusions that the libelant is entitled to recover any maintenance whatever are, and each thereof is, against law.

X.

The Court erred in concluding that libelant is entitled to recover from respondent the sum of $164.50 and his costs of Court.

No. 12427

United States
Court of Appeals
for the Ninth Circuit.

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Defendant and Appellant.

A. T. SUTER,
65 Market Street,
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the Municipal Court of the City and County of San Francisco, State of California

No. 205597

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation, DOE ONE, DOE TWO, DOE THREE,

Defendants.

CERTIFICATE OF CLERK OF MUNICIPAL COURT ON REMOVAL

I, Ivan L. Slavich, Clerk of the Municipal Court of the City and County of San Francisco, State of California, in and for said City and County, do hereby certify that I have compared the annexed and foregoing copy of Complaint, Petition of Defendant, Commodity Credit Corporation, a corporation, for Removal of said cause to the United States District Court in and for the Northern District of California, Southern Division, Bond for Removal on behalf of said Commodity Credit Corporation; also of Notice of Petition for Removal (with copy of Petition and Bond for Removal attached), and Order for Removal, in the case of Petaluma and Santa Rosa Railroad Company, a corporation,

Plaintiff, v. Commodity Credit Corporation, a corporation, Poultry Producers of Central California, a corporation, Doe One, Doe Two, Doe Three, Defendants, Cause No. 205597, constituting the record in said cause, with the originals now on file in my office, and that said annexed and foregoing copies are true and correct transcripts thereof and of the whole of said originals.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 8th day of April, 1948.

April 8, 1948.

IVAN L. SLAVICH,
Clerk.

[Seal] By /s/ A. C. McCHESNEY,
Chief Deputy.

[Endorsed]: Filed April 22, 1948.

[Title of Municipal Court and Cause.]

COMPLAINT FOR FREIGHT CHARGES

Plaintiff complains of defendants, and for cause of action alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco.

II.

That defendant Commodity Credit Corporation is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California.

III.

That defendant Poultry Producers of Central California, is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco.

IV.

That plaintiff is not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe One, Doe Two, Doe Three, and, therefore, sues said defendants by such fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when the same have been ascertained.

V.

That within two years last past defendants, and each of them, became, and now are, indebted to plaintiff in the sum of $1,954.14, as and for undercharges on eight carload shipments of bulk wheat transported by plaintiff and its connecting carriers and delivered by plaintiff at Petaluma, California, to defendant Poultry Producers of Central Califor-

nia; that the consignor of said shipments was defendant Commodity Credit Corporation; that the details of said shipments are set forth on three statements attached hereto, made a part hereof, and marked "Exhibit A," "Exhibit B" and "Exhibit C"; that the transportation charges due on account of the transportation of said shipments, in accordance with and pursuant to the tariffs of plaintiff and its connecting carriers at all times herein mentioned duly posted, published and on file with the Interstate Commerce Commission were $9,398.82, no part of which has been paid except the sum of $7,444.68; that plaintiff has duly performed each and every act on its part to be performed; that although demand has been made upon defendants and each of them for said charges, payment has been refused, and there is now due, owing and unpaid from the defendants, and each of them, to the plaintiff herein, the sum of $1,954.14.

Wherefore, plaintiff demands judgment against defendants and each of them for the sum of $1,954.14, together with interest thereon, and for its costs, and for such other and further relief as to the Court may seem just and proper.

A. T. SUTER,
E. L. VAN DELLEN,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Roy G. Hillebrand, being first duly sworn, deposes and says:

That he is an officer, to-wit, Secretary of Petaluma and Santa Rosa Railroad Company, the plaintiff in the above-entitled action, and makes this verification for and on behalf of said plaintiff; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ROY G. HILLEBRAND.

Subscribed and sworn to before me this 24th day of April, 1946.

[Seal] A. L. WHITTLE,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

Petaluma and Santa Rosa R.R. Co.

Uncollected Freight Charges

Debtor Poultry Producers of Cent. Calif. or Commodity Credit Corp. YU-PSR-151

From	To	Freight Bill No.	Waybill No.	Waybill Date	Int.	Car No.	Commodity	Weight	Tariff Charges	Amount Collected	Bal'ce Due
Etzikom, Alta.	Petaluma, Calif.	5498	44	4/12/44	LN	10913	Bulk Wheat	93395	989.29	780.85	208.44
Etzikom, Alta.	Petaluma, Calif.	5606	43	4/10/44	LV	75624	Bulk Wheat	89400	947.14	747.49	199.65
Etzikom, Alta.	Petaluma, Calif.	5607	42	4/10/44	SLSF	162775	Bulk Wheat	115000	1217.22	954.45	262.77
Etzikom, Alta.	Petaluma, Calif.	5608	50	4/13/44	NW	41525	Bulk Wheat	120000	1269.97	1003.00	266.97
Innisfail, Alta.	Petaluma, Calif.	7515	25	5/25/44	IC	28972	Bulk Wheat	120350	1369.94	1105.17	264.77
									5793.56	4590.96	1202.60

EXHIBIT "B"

Petaluma and Santa Rosa R.R. Co.

Uncollected Freight Charges

Debtor Balfour Guthrie Co. Ltd. c/o Poultry Producers of Cent. Calif. or Commodity Credit Corp.

YU-PSR-152

From	To	Freight Bill No.	Waybill No.	Waybill Date	Int.	Car No.	Commodity	Weight	Tariff Charges	Amount Collected	Bal'ce Due
Stavely, Alta.	Petaluma, Calif.	5715	76	4/10/44	FW&D	7408	Bulk Wheat	90000	966.97	766.00	200.97
Stavely, Alta.	Petaluma, Calif.	5667	77	4/10/44	ITC	6067	Bulk Wheat	123960	1330.34	1054.66	275.68
									2297.31	1820.66	476.65

Consigned to Balfour Guthrie Co., Ltd.
Delivery Taken by Poultry Producers of Cent. Calif.

EXHIBIT "C"

Petaluma and Santa Rosa R.R. Co.

Uncollected Freight Charges

Debtor Consumers Credit Corpn.—Portland, Ore. YU-PSR-156 File: YDA—P&SR—8

From	To	Freight Bill No.	Waybill No.	Waybill Date	Int.	Car No.	Commodity	Weight	Tariff Charges	Amount Collected	Bal'ce Due
Etzikom, Alta. Can	Petaluma, Calif.	5605	CP 39	4/ 8/44	UP	192493	C/L bulk wheat	123600	$1,303.98		
									1.00 Insp. CP Ry. Co.		
									2.97 Insp. GN		
									$1,307.95	1,033.06	274.89

Consigned to: Order of Consumers Credit Corpn.
Notify Consumers Feed Store
% Poultry Producers of Central of Calif.

Rate: 15½¢ to Sweet Grass, Mont.
40¢ to Spokane, Wash.
50¢ beyond

Tariff: CP Trf. W-819
NPC—13
PFTB—241

Consigned to Consumers Feed Store but delivery order signed by Poultry Producers of Central Calif.

[Endorsed]: Filed April 25, 1948, Municipal Court.

PLAINTIFF'S EXHIBIT NO. 5.

ates and charges published in this tariff are subject to the increases provided in Item X-148 cessive issues thereof.
he operation of portions of this tariff referred to in Item No. 1 is suspended as provided l item.

I. Ry. Cal. R. C. No. 75.
ncels Cal. R. C. No. 63.
Ry. Minn. R. C. No. 940.
ncls Minn. R. C. No. 853.
Ry. Mont. R. C. No. 632.
ncls Mont. R. C. No. 581.
Ry. N. D. P. S. C. No. 231.
ls N. D. P. S. C. No. 212.

G. N. Ry. C. T. C. No. 2302.
Cancels C. T. C. No. 2268.
G. N. Ry. P. S. C. of Wis. No. 198.
Cancels P. S. C. of Wis. No. 175.
G. N. Ry. P. U. C. of I. No. 251.
Cancels P. U. C. of I. No. 242.
G. N. Ry. P. U. C. Ore. No. 643.
Cancels P. U. C. Ore. No. 611.

C.T.C. - Canadian Transport

G. N. Ry. P. U. C. of S. D. No. 279.
Cancels P. U. C. of S. D. No. 265.
G. N. Ry. W. D. P. S. No. 1481.
Cancels W. D. P. S. No. 1424.
G. N. Ry. I. C. C. No. A-8071.
Cancels I. C. C. No. A-7892.

G. N. Ry. G. F. O. No. 1240-O. 7-16-44
Cancels G. F. O. No. 1240-N.

Cancels 1240-N

GREAT NORTHERN RAILWAY COMPANY

—In Connection With—

FARMERS GRAIN AND SHIPPING COMPANY. (FX 2, No. 11.)
THE MIDLAND RAILWAY COMPANY OF MANITOBA. (FX 5, No. 1.)

Return to Mrs. Burgess

LOCAL AND JOINT FREIGHT TARIFF

—Providing—

RULES AND CHARGES

—Governing—

Diversion or Reconsignment of Freight and Holding of Cars for Surrender of Bills of Lading or Written Orders, or Inspection at points on the above named lines.

OCT 6 1942

ISSUED SEPTEMBER 16, 1942.

EFFECTIVE OCTOBER 20, 1942.
(Except as otherwise provided herein.)

I. BURNHAM,
ight Traffic Manager,
reat Northern Railway Co.,
ST. PAUL, MINN.

B. S. MERRITT,
Western Traffic Manager,
Great Northern Railway Co.,
SEATTLE, WASH.

Issued by
W. D. O'BRIEN,
General Freight Agent,
Great Northern Railway Co.,
175 East Fourth Street,
ST. PAUL, MINN.

Printed by McGill-Warner Co., in St. Paul, Minn., U. S. A.

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[Title of Municipal Court and Cause.]

NOTICE OF PETITION AND BOND FOR REMOVAL

(With copy of Petition and Bond for Removal Attached)

To: The Plaintiff Above Named and to A. T. Suter and E. L. Van Dellen, Attorneys for Plaintiff:

You, and each of you, will please take notice that Commodity Credit Corporation, one of the defendants in the above-entitled action, intends to file therein a petition and bond for removal, copies of which petition and bond are hereto attached and made a part hereof, reference to which is hereby expressly made for further particulars; and that it will, on the 2nd day of April, 1948, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, apply to the above-entitled court at the City Hall, in the City and County of San Francisco, State of California, for an order, upon said petition and bond and upon this notice, removing said cause to the United States District Court in and for the Northern District of California, Northern Division.

Dated: April 2, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney for the Northern District of California.

/s/ WILLIAM E. LICKING,
Assistant United States Attorney, Attorneys for defendant Commodity Credit Corporation.

Receipt of copy of the foregoing notice of Petition and Bond for Removal (with copy of Petition and Bond for Removal attached) is hereby acknowledged this 2nd day of April, 1948.

/s/ A. T. SUTER,

/s/ E. L. VAN DELLEN,
Attorneys for Plaintiff.

[Endorsed]: Filed and entered April 2, 1948. Municipal Court.

[Title of Municipal Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

To: The Honorable, The Municipal Court Of the City and County Of San Francisco, State Of California:

I.

Your Petitioner, Commodity Credit Corporation, is a corporation organized and existing under the laws of the State of Delaware and is one of the defendants in the above entitled suit, and as such files this petition.

Said suit, as appears from plaintiff's complaint on file herein is of a civil nature, at law over which the United States District Court hereinafter mentioned has original jurisdiction. Said suit, as appears from the complaint on file herein, reference to which is hereby made, and which is by said refer-

ence made a part hereof, was brought by the Petaluma and Santa Rosa Railroad Company, a California corporation and a common carrier subject to the provisions of the "Inter-State Commerce Act," against your petitioner and the Poultry Producers of Central California, a California corporation, to recover freight charges allegedly due on account of alleged shipments over the lines of plaintiff and its connecting carriers, in accordance with and pursuant to the tariffs of plaintiff and said connecting carriers published and on file with the Interstate Commerce Commission as required by the laws of the United States regulating interstate commerce (49 U.S.C.A. 6).

II.

Your petitioner as aforesaid is a corporation organized and existing under the laws of the State of Delaware and is now and was at all times mentioned in said complaint, an Agency of the United States by virtue of the provisions of 15 U.S.C.A. 713.

III.

Petitioner was not served with summons in said suit until March 24, 1948 and is not required by the laws of the State of California nor by any rule of court to answer or otherwise plead to said complaint prior to April 3, 1948.

IV.

By reason of the foregoing facts your petitioner claims and alleges that the cause is propery removable to the United States District Court in and for the Northern District of California, Southern Division thereof, upon the ground that the controversy arises under a law regulating commerce, (49 U.S.C.A. 6), of which the District Court of the United States has original jurisdiction. (28 U.S.C.A. 41, par. 8).

V.

Your petitioner files and offers herewith its bond, with good and sufficient surety, for its entering in the Northern District of California, Southern Division thereof within thirty (30) days from the filing of this petition, a certified copy of the record of said suit, and for paying all costs which may be awarded by said District Court should said Court hold said suit to have been wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Honorable Court accept said bond as good and sufficient, approve the same, and make its order for the removal of said suit to the United States District Court for the Northern District of California, Southern Division thereof, pursuant to the law of the United States of America in such case made and provided (28 U.S.C.A. 71), and that it cause the record herein to be removed to said District Court, and

that no other or further proceedings be had in said suit in this Court.

Respectfully,
COMMODITY CREDIT
CORPORATION,

By /s/ HENRY C. SOITO,
Acting Director, San Francisco Office Commodity Credit Corporation.

/s/ JESSE R. FARR,
Regional Attorney, Office of the Solicitor, U. S. Department of Agriculture.

/s/ FRANK J. HENNESSY,
U. S. Attorney, Northern
District of California.
WILLIAM E. LICKING,
Asst. U. S. Attorney,
Attorneys for Petitioner.

State of California,
City and County of San Francisco—ss.

Henry C. Soito, being first duly sworn, deposes and says:

I am an officer, to wit: Acting Director of the San Francisco Office of the Commodity Credit Corporation, one of the defendants in the above-entitled action, and I make this verification on its behalf. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on

information or belief, and as to those matters I believe it to be true.

HENRY C. SOITO.

Subscribed and sworn to before me this 2nd day of April, 1948.

/s/ JOHN E. SCHAEFFER,
Deputy Clerk U. S. District Court, Northern District of California.

Receipt of service of the above Petition, Notice of Petition and Bond for Removal is hereby acknowledged, and notice of hearing is hereby expressly waived.

/s/ A. T. SUTER,

/s/ E. L. VAN DELLEN,
Attorneys for Plaintiff, Petaluma and Santa Rosa Railroad Company.

Receipt of service of the above Petition, Notice of Petition and Bond for Removal is hereby acknowledged, and this defendant hereby specifically waives any objection to the contemplated removal.

/s/ CARL R. SCHULZ,
Attorney for Poultry Producers of Central California.

[Endorsed]: Filed and entered April 2, 1948, Municipal Court.

[Title of Municipal Court and Cause.]

BOND FOR REMOVAL

Know all Men by These Presents:

That United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said state, as surety, is held and firmly bound unto the Petaluma and Santa Rosa Railroad Company, a corporation, plaintiff in the above-entitled action, in the penal sum of Five Hundred Dollars ($500), for the payment of which sum well and truly to be made unto said plaintiff, its heirs, executors, administrators or assigns, the undersigned, United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with the seal of said company and dated at the City and County of San Francisco, State of California, this 2nd day of April, 1948.

Whereas Commodity Credit Corporation, a corporation, one of the defendants in the above-entitled action, has petitioned or is about to petition the above named Municipal Court of the City and County of San Francisco, State of California, for the removal of the above-entitled cause or action therein pending, wherein Petaluma and Santa Rosa Railroad Company, a corporation, is plaintiff, and Commodity Credit Corporation, a Corporation,

Poultry Producers of Central California, a corporation, Doe One, Doe Two, Doe Three, are defendants, to the United States District Court in and for the Northern District of California, Southern Division.

Now, the condition of this obligation is such that if the said defendants shall enter in said United States District Court in and for the Northern District of California, Southern Division, within thirty (30) days from the date of the filing of its petition for removal of said cause, a certified copy of the record in the above entitled suit or action, and shall pay all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

The said United States Fidelity and Guaranty Company hereby expressly agrees that in case of a breach of any condition hereof the said District Court may, upon notice to it of not less than ten (10) days, proceed summarily in the action, suit, case or proceeding in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

Witness the signature and seal of the undersigned the day and year first above written.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
PATRICIA LOYD,
Its Attorneys in Fact,

Power of Attorney is on file in the County above named.

State of California,
County of San Francisco—ss.

On this 2nd day of April in the year one thousand nine hundred and forty-eight before me, G. B. Gillen a Notary Public in and for the County of San Francisco personally appeared Patricia Loyd known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

G. B. GILLEN,
Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed and entered April 2, 1948, Municipal Court.

[Title of Municipal Court and Cause.]

ORDER FOR REMOVAL

On reading the petition of defendant Commodity Credit Corporation for the removal of the above entitled action to the United States District Court, in and for the Northern District of California, Southern Division, and the bond for removal on behalf of said defendant, which said petition and bond have been heretofore filed in said action; and it appearing to the Court that written notice of said petition and bond for removal were duly given by said defendant to plaintiff prior to filing said petition and bond, and this matter coming on for hearing, said bond is hereby approved and accepted as good and sufficient, and

It Is Hereby Ordered that said cause be, and the same is hereby, removed to the United States District Court, in and for the Northern District of California, Southern Division.

Dated: This 2nd day of April, 1948.

HARRY J. NEUBARTH,
Judge of the Municipal Court.

[Endorsed]: Filed and entered April 2, 1948, Municipal Court.

The foregoing document on removal from the Municipal Court of the City and County of San Francisco, [Endorsed]: Filed April 22, 1948, U. S. D. C.

In the United States District Court for the Northern District of California, Southern Division

No. 28,025-R

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a Corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a Corporation, DOE ONE, DOE TWO, DOE THREE,

Defendants.

ANSWER OF COMMODITY CREDIT CORPORATION

Comes now Commodity Credit Corporation, named co-defendant in this proceeding, and answers the complaint and the allegations therein as follows:

I.

This defendant is without knowledge or information sufficient to form a belief as to the truths of the allegations in paragraph I of the complaint and therefore denies them.

II.

The allegations in paragraph II of the complaint are admitted.

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph II of the complaint and therefore denies them.

IV.

Paragraph IV of the complaint contains no allegations of material fact requiring an answer.

V.

This defendant admits the allegations in paragraph V of the complaint, except that the allegations of indebtedness to plaintiff are denied. Plaintiff's freight bills as originally rendered and paid totaled the amounts stated in the exhibits annexed to the complaint, in the column entitled "Amount Collected," and the lawful tariff charges totaling $7,444.68 were paid in full.

VI.

The shipments covered by said freight bills consisted entirely of carloads of bulk wheat, which were moved by plaintiff and connecting carriers in the United States from Sweetgrass, Montana, a Canadian border station on the lines of the Great Northern Railway, to destination in California on plaintiff's lines. Upon leaving Sweetgrass said movements became subject to the provisions of the Great Northern Railway Company's local and joint tariffs, particularly its tariff, I.C.C. No. A-8071

(and supplements), entitled "Local and Joint Freight Tariff Providing Rules and Charges Governing the Diversion or Reconsignment of Freight and Holding of Cars for Surrender of Bills of Lading or Written Orders, or Inspection at points on the above named lines." Upon leaving Sweetgrass all of said shipments became governed by Item 143 of said tariff which provided as follows:

"Item No. 143. Grain, Seeds, etc., Placed on Track for Inspection and Held for Disposition Orders:

Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of

loading of car or from the point at which it becomes subject to combination of rates as provided in this rule.

* Expires six months after the termination of the present war.

(The form of this publication is permitted by authority of the Interstate Commerce Commission permission No. 9014 of May 6, 1942.)"

No person representing this defendant gave to the carriers any orders requiring inspection or diversion Sweetgrass subject to Item 143 in excess of the allowances provided in the first clause of Item 143.

The plaintiff's freight bills as paid were properly calculated on a rate basis using the through tariff rates from Sweetgrass to destination. All lawful charges have been paid in full.

Wherefore, Defendant Commodity Credit Corporation prays the Court to dismiss the complaint against it.

Respectfully submitted,

/s/ H. G. MORISON,
Asst. Attorney General.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ WILLIAM E. LICKING,
Asst. U. S. Attorney, Attorneys for Commodity Credit Corporation.

[Endorsed]: Filed June 29, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND CROSS-CLAIM

Comes now defendant Poultry Producers of Central California and answers the complaint and the allegations therein as follows:

1. Answering the allegations of paragraph V of the complaint, admits that shipments were made as described in said paragraph and in Exhibits "A," "B" and "C" of the complaint, but alleges that there were no undercharges on said shipments, and alleges that the tariff charges, computed in accordance with the tariffs of the plaintiff duly posted, published and on file with the Interstate Commerce Commission, were in the sums set forth on Exhibits "A," "B" and "C" in the column headed "Amount collected," and alleges that the total tariff charges on all the shipments amounted to $7,444.68 and not more; and alleges that all tariff charges on said shipments have been paid and that this defendant is not indebted to plaintiff in any sum.

2. Further answering said complaint, this defendant alleges that the complaint does not state a claim against this defendant upon which relief can be granted.

Cross-Claim

Defendant Poultry Producers of Central California cross-claims against defendant Commodity Credit Corporation and alleges:

1. That defendant Poultry Producers of Central California is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

2. That defendant Commodity Credit Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware.

3. That the shipments described in the complaint were sold by defendant Commodity Credit Corporation to defendant Poultry Producers of Central California on a delivered basis at Petaluma, California, and by the terms of that agreement defendant Commodity Credit Corporation agreed to pay transportation charges on said shipments to Petaluma, California.

4. That if any additional charges are due or payable on said shipments by defendant Poultry Producers of Central California then, in that event, defendant Commodity Credit Corporation is obligated to reimburse defendant Poultry Producers of Central California for any payment it may be required to make in payment of such charges.

Wherefore, defendant Poultry Producers of Central California prays judgment that plaintiff recover nothing, or in the alternative that it have judgment against defendant Commodity Credit Corporation on its cross-claim for the amount of any judgment which may be rendered against it in this

action, and for its costs of suit and such other relief as may be just and equitable in the premises.

/s/ CARL R. SCHULZ,
Attorney for defendant Poultry Producers of Central California.

[Endorsed]: Filed August 23, 1948.

In the Southern Division of the United States District Court for the Northern District of California

No. 28,025-R

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation, et al.,

Defendants.

MEMORANDUM OPINION

Action to recover freight charges. Judgment for plaintiff in accordance with opinion.

A. T. Suter and E. L. Van Dellen of San Francisco, California, attorneys for plaintiff.

Frank J. Hennessy, United States Attorney, and C. Elmer Collett, Assistant United States Attorney,

of San Francisco, California, attorneys for defendant Commodity Credit Corporation.

Carl R. Schulz of San Francisco, California, attorney for defendant Poultry Producers of Central California.

Roche, D. J.:

This is an action to recover freight charges alleged to be due on eight wheat shipments made during the spring of 1944 from various points in Canada to defendant Poultry Producers of Central California. The wheat was purchased by defendant Commodity Credit Corporation as part of a special emergency wartime United States Government relief program. Pursuant to the purchase agreement the Canadian shipper prepaid the freight charges to the border point known as Sweetgrass, Montana, and Commodity Credit Corporation paid the charges from that point on. This litigation concerns the applicable rate from Sweetgrass to Petaluma, California, the shipments' destination.

The case was tried to the Court on stipulated facts from which the foregoing appear. It further appears that plaintiff is a connecting line with the Great Northern Railway Company into whose hands the shipments passed at Sweetgrass and that the freight rate is governed by the provisions of Great Northern's Rules Tariff No. 1240-O, I.C.C. No. A-8071, Item No. 143, which, so far as pertinent, is as follows:

"(E) Item No. 143. Grain, Seeds, etc., Placed on Track for Inspection and Held for Disposition Orders.

"Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

"In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in this rule."

This tariff provision was made effective October 20, 1942, and was for the purpose of conserving cars and keeping traffic moving by restricting the number of inspections and diversions permitted. At the time it became effective no shipments of wheat were being transported from Canadian points to the United States and hence its applicability to

shipments originating in Canada was not contemplated when the rule was framed.

By amendment effective February 16, 1949, the second paragraph of the tariff rule had added to it the phrase, "or the point where the car comes in possession of carriers within the United States." The publication announcement of this amendment bears the statement, "The above mentioned change is for clarification purposes."

The eight shipments were originally billed to defendant Commodity Credit Corporation at Ogden, Utah, for inspection and diversion but before they reached Sweetgrass, blanket instructions were issued to Great Northern Railway to divert all such shipments to Spokane, Washington, for inspection and diversion. This was done, and as each of the eight cars reached Spokane, it was inspected and diverted to Petaluma, California, where it was delivered to defendant Poultry Producers as the new consignee. Each car had also received one inspection in Canada, pursuant to requirements of the Canada Grain Act, prior to its arrival at Sweetgrass.

The question for decision is whether such Canadian inspection should be included in figuring the number of inspections and diversions each shipment was subjected to. Its inclusion would result in each shipment having two inspections and one diversion before its diversion at Spokane and thus it would become subject to the combination of rates (Sweetgrass to Spokane; Spokane to Petaluma) as having

exceeded the number of inspections and diversions allowed by the tariff rule. On the other hand, if each shipment be treated as originating at Sweetgrass, the flat through rate from Sweetgrass to Petaluma would be applicable since the only inspection and diversion would be those at Spokane.

Plaintiff's original freight bills were computed at the flat rate and were duly paid by defendant Commodity Credit Corporation. Shortly thereafter Plaintiff submitted supplemental bills for additional charges based on the combination rate, on the theory that the Canadian inspection stop should be included. These supplemental charges are in dispute.

Plaintiff bases its theory on the language of the tariff rule's second paragraph, which provides that "In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in this rule." (Underlining the Court's.) Plaintiff points out that the last point of loading each car was in Canada preceding the Canadian inspection and that the rule, by its terms, thus includes such inspection.

Defendant takes the position that an American railroad's tariff rate cannot be made to depend on what happens to a shipment before it reaches the United States and that, furthermore, the amendment to the tariff rule shows that it was never contemplated that it would be applied to a situation like the present one.

The difficulty with defendant's first argument is that the rate is not affected. The tariff rule simply lays down certain requirements which must be met if the flat through rate is to be applicable. If they are not met, the combination rate applies. In neither event is the freight rate itself changed. The requirements are stated in clear, unambiguous language. The Court has no power to change them by inserting another and different requirement, even though it might seem more reasonable and equitable.

Defendant's second argument would have the Court apply retroactively the 1949 amendment to the tariff rule. Tariffs have the force of law and, if ambiguous, are subject to the usual rules of statutory construction. Any ambiguity should be resolved against the carrier. However, if the tariff provisions are clearly expressed, the fact that the framers may have omitted a provision later found necessary to make the tariff conform to the purpose of its framers does not render the original tariff rule ambiguous. See Southern Pacific Company v. Rice Sales Co., 174 S.W. 2d 1018 and cases cited therein. The Court cannot concern itself with the fact that a situation not contemplated originally arose after the rule was framed. Its duty is to apply the rule as it existed at the time of the shipments in question. When this is done it is clear that the last point of loading each car was in Canada; that each car received one inspection and one diversion after such loading and prior to its inspection at Spokane; that upon inspection and

diversion at Spokane it became subject to the combination of rates, as provided in the tariff rule. It follows, therefore, that plaintiff is entitled to the additional freight charges.

Defendant Commodity Credit Corporation's objection to the inclusion of the Canadian inspection as a stipulated fact is overruled. Defendant Poultry Producers of Central California having cross-claimed against the Commodity Credit Corporation for the amount of any judgment that might be rendered against it and the parties having stipulated that Poultry Producers of Central California is entitled to such reimbursement, it is now by the Court

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the plaintiff and against the defendant Commodity Credit Corporation in the sum of $1,954.14, together with interest thereon at the rate provided by law, and that the respective parties pay their own costs.

Dated: April 15th, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed April 15, 1949.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW LODGED BY PLAINTIFFS

Defendant, Commodity Credit Corporation, does hereby propose the following amendments and additions to the Findings of Fact and Conclusions of Law lodged by plaintiff.

I.

That proposed Findings of Fact X, XIV and XV be not adopted by the Court in its Findings in that said proposed Findings of Fact X, XIV and XV are not findings of fact but are conclusions of law.

II.

That proposed Finding of Fact X be amended to read as follows:

X.

That the provision of the Great Northern Railway Rules Tariff No. 1240-O, ICC .No. A-8071, Item No. 143, "or from the point at which it becomes subject to combination of rates as provided in this rule," was not applicable to the said shipments during their movement in Canada, in that they were not subject to Great Northern Railway Tariffs during the course of said movement in Canada.

III.

That the following Finding of Fact be made:

XVIII.

That the said Item 143 of the Great Northern Railway Rules was amended to become effective February 16, 1949, by the addition of the following phrase: "or the point where the car comes in possession of carriers within the United States," said amendment being "for clarification purposes."

IV.

That the following Finding of Fact be made:

XIX.

That the provisions of the Great Northern Railway Rules Tariff referred to herein were ambiguous with regard to their application to cars prior to the time they came into possession of the Great Northern Railway within the United States in that the portion of Item 143 "or from the point at which it becomes subject to combination rates as provided in this rule," could not be applied prior to the time the said shipment came into possession of the Great Northern Railway within the United States.

V.

That the proposed Conclusions of Law be amended to read as follows:

1. That the provisions of Great Northern Railway Rules Tariff Item No. 143 are applicable to the shipments referred to herein at the time and from the point where said shipments came into possession of the Great Northern Railway within the United States, and the number of inspections and

diversions must be determined in accordance with said Rule Item No. 143 from the said point where said shipment came within possession of the Great Northern Railway within the United States.

2. That defendant Commodity Credit Corporation has paid all lawful tariff charges for transportation of the shipments referred to herein.

3. That plaintiff is entitled to nothing by the complaint on file herein and defendant should have judgment for its costs of suit.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.

Lodged May 27, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on before this Court, sitting without a jury, for trial, Honorable Michael J. Roche, presiding, A. T. Suter, of San Francisco, California, appearing for the plaintiff, Frank J. Hennessy, United States Attorney, and C. Elmer Collett, Assistant United States Attorney, of San Francisco, California, appearing for defendant Commodity Credit Corporation, and Carl R. Schulz, of San Francisco, California, appear-

ing for defendant Poultry Producers of Central California, and

Said action having been tried on the 16th day of February, 1949, upon a Stipulation of Facts, and after argument and submission of briefs by plaintiff and defendant Commodity Credit Corporation, and said action having been submitted for decision on the 23rd day of February, 1949, the court being advised in the premises, now makes the following:

Findings of Fact

I.

That this action arises under a law of the United States regulating interstate commerce in that it arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act of which this court has jurisdiction under Title 28, U. S. Code, Section 41 Subdivision (8).

II.

That plaintiff Petaluma and Santa Rosa Railroad Company is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City and County of San Francisco.

III.

That defendant Commodity Credit Corporation is now and at all times herein mentioned was a corporation organized and existing under and by

virtue of the laws of the State of Delaware and doing business in the State of California.

IV.

That defendant Poultry Producers of Central California is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City and County of San Francisco.

V.

That defendant Commodity Credit Corporation was the original consignee of the following described shipments of bulk wheat:

Car No.		Origin	Date	Final Destination
LN	10913	Etzikom, Alta.	4/12/44	Petaluma, California
LV	75624	Etzikom, Alta.	4/10/44	Petaluma, California
SLSF	162775	Etzikom, Alta.	4/10/44	Petaluma, California
NW	41525	Etzikom, Alta.	4/13/44	Petaluma, California
IC	28972	Innisfail, Alta.	5/25/44	Petaluma, California
FW&D	7408	Stavely, Alta.	4/10/44	Petaluma, California
ITC	6067	Stavely, Alta.	4/10/44	Petaluma, California
UP	192493	Etzikom, Alta.	4/ 8/44	Petaluma, California

VI.

That plaintiff Petaluma and Santa Rosa Railroad Company delivered each of said shipments to defendant Poultry Producers of Central California at Petaluma, California.

VII.

That freight charges were originally assessed on each of said shipments on the basis of a rate of

15½ cents per cwt. on the movement from the Canadian point of origin to the international boundary at Sweetgrass, Montana (Coutts Alberta, Canada), and a rate of 68 cents per cwt. on the movement from Sweetgrass, Montana, to Petaluma, California, or a total rate of 83½ cents per cwt., plus a special charge of $1.00 for inspection in Canada; that the total charges assessed on the said shipments computed on the foregoing rate basis were the sum of $7,444.68, which charges have been paid in part by the original shipper and in part by defendant Commodity Credit Corporation.

VIII.

That at the time each of the said shipments was transported the following provisions of Great Northern Railway's Rules Tariff No. 1240-O. I.C.C. No. A-8071, Item No. 143, were in effect:

"(E) Item No. 143. Grain, Seeds, etc., placed on Track for Inspection and Held for Disposition Orders.

"Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the

combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

"In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in this rule."

IX.

That said tariff provision was made effective on October 20, 1942, and was for the purpose of conserving cars and keeping traffic moving by restricting the number of inspections and diversions permitted.

X.

That under the provisions of the foregoing tariff rule the number of inspections and/or diversions allowed each of the said shipments must be computed from the original point of origin in Canada, and where such shipments received more than two inspections and/or diversions, charges to be assessed for transportation in the United States are properly computed on the basis of a combination of rates to and from the point at which a third inspection and/or diversion is requested.

XI.

That each of the said shipments was inspected at a point in Canada.

XII.

That each of said shipments was originally destined to Ogden, Utah, but prior to their arrival at that point each of said shipments was diverted at request of defendant Commodity Credit Corporation to Spokane, Washington.

XIII.

That after arrival of each of said shipments at Spokane, Washington, they were inspected and thereafter diverted at the request of defendant Commodity Credit Corporation to defendant Poultry Producers of Central California at Petaluma, California.

XIV.

That under the foregoing facts and provisions of the Great Northern Railway Rules Tariff referred to, as interpreted herein, the applicable tariff charges on each of the said shipments are those based upon a rate of 15½ cents per cwt. on the movement from the Canadian point of origin to the international boundary at Sweetgrass, Montana (Coutts, Alberta, Canada), and a rate of 40 cents per cwt. on the movement from Sweetgrass, Montana, to Spokane, Washington, and a rate of 50 cents per cwt. on the movement from Spokane, Washington, to Petaluma, California, or a total rate of $1.05½ per cwt., plus a special charge of $1.00 for inspection in Canada and a charge of $2.97 for the inspection of each car at Spokane, Washington; that the total charges on the ship-

ments, computed on the foregoing rate basis, are the sum of $9,398.82.

XV.

That the difference between the freight charges which have been collected on the said shipments in the sum of $7,444.68 and the lawful tariff charges as indicated herein in the sum of $9,398.82 is the sum of $1,954.14; that the latter sum has not been paid by the defendants herein, or anyone, to the plaintiff herein, or to any of its connecting carriers.

XVI.

That the rate of 15½ cents per cwt. referred to herein is contained in applicable tariffs of Canadian Railways; that the rate of 68 cents per cwt. referred to herein is contained in Item 3900-A Pacific Freight Tariff Bureau Tariff No. 241-B, Agent J. P. Haynes, ICC No. 1364; that the rate of 40 cents per cwt. referred to herein is contained in North Pacific Coast Freight Bureau Tariff 13-C, ICC No. 606; that the rate of 50 cents per cwt. referred to herein is contained in Item 1950 Pacific Freight Tariff Bureau Tariff 241-B, Agent J. P. Haynes, ICC No. 1364.

XVII.

That the various shipments referred to herein were transported from points of origin indicated in paragraph V hereof to the international boundary at Sweetgrass, Montana (Coutts, Alberta, Canada), and thence to Spokane, Washington, and thence to Petaluma, California, where the said ship-

ments were delivered to defendant Poultry Producers of Central California by the plaintiff Petaluma and Santa Rosa Railroad Company.

Conclusions of Law

1. That the provisions of the Great Northern Railway Rules Tariff referred to herein are applicable to the shipments referred to herein, and those provisions are interpreted to mean that the number of inspections and/or diversions allowed each of the said shipments must be computed from the original point of origin in Canada, and where more than two inspections and/or diversions are used in connection with a particular shipment the charges to be assessed for transportation in the United States are properly computed on the basis of a combination of rates to and from the point at which a third inspection and/or diversion is requested.

2. That under the facts found herein and interpretation of Great Northern Railway Rules Tariff referred to herein, the lawful tariff charges for transportation of the shipments referred to herein are those computed on the basis of a rate of 15½ cents per cwt. for the movement from the Canadian point of origin to the international boundary at Sweetgrass, Montana (Coutts, Alberta, Canada), and a rate of 40 cents per cwt. for the movement from Sweetgrass, Montana, to Spokane, Washington, and a rate of 50 cents per cwt. for the movement from Spokane, Washington to Petaluma, California ,or a total rate of $1.05½ per cwt., plus a spe-

cial charge of $1.00 for inspection in Canada, and a charge of $2.97 for the inspection of each car at Spokane, Washington.

3. That defendant Commodity Credit Corporation is lawfully obligated to pay unpaid freight charges on the said shipments in the sum of $1,954.14.

4. That plaintiff have judgment against defendant Commodity Credit Corporation in the sum of $1,954.14, together with interest at the rate of 7 per cent, to be computed on the unpaid freight charges on each shipment from the date of delivery thereof as indicated below:

Car Number	Date of Delivery	Amount of Undercharge
L&N 10913	May 3, 1944	$ 208.44
LV 75624	May 5, 1944	199.65
SLSF 162775	May 5, 1944	262.77
NW 41525	May 5, 1944	266.97
IC 28972	June 17, 1944	264.77
FW&D 7408	May 8, 1944	200.97
ITC 6067	May 6, 1944	275.68
UP 192493	May 5, 1944	274.89
		$1,954.14

5. That each party hereto pay their own costs.

Let the Judgment Be Entered Accordingly.

Dated this 10th day of June, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Receipt of Copy acknowledged.

Lodged April 21, 1949.

[Endorsed]: Filed June 10, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28,025-R

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a Corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a Corporation, et al.,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial in the above-entitled court sitting without a jury, Honorable Michael J. Roche, presiding, A. T. Suter appearing for the plaintiff, Frank J. Hennessy, United States Attorney, and C. Elmer Collett, Assitant United States Attorney, appearing for defendant Commodity Credit Corporation, and Carl R. Schulz appearing for defendant Poultry Producers of Central California, and

Said action having been tried on the 16th day of February, 1949, upon a Stipulation of Facts, and after argument and submission of briefs by plaintiff and defendant Commodity Credit Corporation, and said action having been submitted for decision on the 23rd day of February, 1949, and

the Court being fully advised in the premises, and having signed and ordered filed its Findings of Fact and Conclusions of Law,

Now, Therefore, it is hereby Ordered, Adjudged, and Decreed that plaintiff have judgment of and from the defendant Commodity Credit Corporation in the sum of $1,954.14, together with interest at the rate of 7% to be computed on the unpaid freight charges on each shipment from the date of delivery thereof as indicated below:

Car Number	Date of Delivery	Amount of Undercharge
L&N 10913	May 3, 1944	$ 208.44
LV 75624	May 5, 1944	199.65
SLSF 162775	May 5, 1944	262.77
NW 41525	May 5, 1944	266.97
IC 28972	June 17, 1944	264.77
FW&D 7408	May 8, 1944	200.97
ITC 6067	May 6, 1944	275.68
UP 192493	May 5, 1944	274.89
		$1,954.14

Dated this 10th day of June, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Court Judge.

Entered in Civil Docket June 11th, 1949.

Approved as to form in accordance with Rule 5(d).

/s/ FRANK J. HENNESSY,
Attorney for Defendant,
Commodity Credit Corp.

/s/ CARL R. SCHULZ,
Attorney for Defendant Poultry Producers of Central California.

Lodged April 21, 1949.

[Endorsed]: Filed June 10, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Honorable the above-entitled Court, and to Petaluma and Santa Rosa Railroad Company, a corporation, Plaintiff, and to A. T. Suter, Esq., 65 Market Street, San Francisco, California, attorney for plaintiff:

You are hereby notified that on June 27, 1949, at the hour of 10:00 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, at the Court Room of the above-entitled court, in the Post Office Building in the City and County of San Francisco, State and Northern District of California, defendants will and hereby do move the above-entitled court for its order granting a new trial in the above-entitled action.

Said motion will be made on the ground that said Findings of Fact and Conclusions of Law and Judgment made herein are:

1. The decision is contrary to the law in the case.

2. The decision is contrary to the evidence in the case.

3. The decision and judgment are contrary to the law and the evidence in the case.

4. The evidence is insufficient to support the decision.

5. The evidence is insufficient to support the decision, and the judgment.

6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary Findings, Conclusions and judgment.

7. The decision and judgment are contrary to and against law.

8. The evidence shows that a decision and judgment should have been rendered in favor of defendants, and that the decision and judgment, as rendered, are contrary to law, and will be based on this notice, the minutes of the court, the record of the evidence herein, on the said Findings, Conclusions and Judgment made herein, and on all the records, papers, pleadings and files in the above-entitled action.

Dated: June 21, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney, Attorneys for Defendant, Commodity Credit Corporation.

[Endorsed]: Filed June 21, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION
FOR NEW TRIAL

It Is Ordered that the defendants' motion for a new trial in the above-entitled cause be and same is hereby Denied.

Dated: October 21st, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Copies mailed.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant Commodity Credit Corporation hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the Northern District of California in favor of plaintiff and against said defendant on June 11, 1949, and from the Order dated October 21, 1949 denying defendant's Motion for New Trial.

Dated: November 7, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court, and to A. T. Suter, Esq., 65 Market Street, San Francisco 5, California, Attorney for Plaintiff:

The defendant Commodity Credit Corporation, by its attorneys, hereby designates for inclusion in Transcript of Record upon Appeal the complete record and all the proceedings and evidence in the action before the District Court.

Dated: November 30, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed November 30, 1949.

PLAINTIFF'S EXHIBIT NO. 1

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 28,025-R

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation, et al.,

Defendants.

STIPULATION

1. The parties hereto agree that the following statements of fact are correct. Each party, however, reserves the right to introduce additional evidence not inconsistent therewith and also to object, on grounds of immateriality or irrelevance, to any fact stated in this stipulation.

2. This action involves a dispute over the freight charges properly assessable on eight carload shipments of imported bulk wheat which were moved by rail from various points in Canada to Petaluma, California, where they were delivered to Poultry Producers of Central California. The specific issue involved is whether the inspections and reconsignments in transit exceeded the number allowed under

Plaintiff's Exhibit No. 1—(Continued)

the governing Great Northern Railway Company Rules Tariff No. 1240-O, I.C.C. No. A-8071, effective October 20, 1942. The applicable provision in said tariff is Item No. 143, of which a photostatic copy appears in the Appendix.

3. Each of the eight shipments was made by a Canadian grain selling organization, which delivered the grain at a point in interior Canada to Canadian Pacific Railway Company, which operates a Canadian railroad system, and which, in turn, issued to the shipper a Uniform Canadian Order Bill of Lading. The shipper's copy of each such original Bill of Lading appears in the Appendix. Each one stated that the freight charges were to be prepaid by the shipper to Coutts, Alberta. Coutts is the point on the International Boundary between Canada and the United States where the Canadian Pacific Railway terminates and connects with the Great Northern Railway, a United States railroad system. That boundary interchange point, which Canadian Pacific Railway Company calls Coutts (in Alberta) is called Sweetgrass (in Montana) by Great Northern Railway Company. For purposes of this case Coutts and Sweetgrass are the same point. Freight charges to Sweetgrass (Coutts) were in fact prepaid by the Canadian shipper. Each shipment was consigned to the order of Commodity Credit Corporation, and the destination named in the bills of lading was, "Ogden, Utah, for inspection and diversion, notify Commodity Credit Cor-

Plaintiff's Exhibit No. 1—(Continued)

poration." The route designated in each of the original Canadian bills of lading was via Canadian Pacific Railway to Sweetgrass, thence via Great Northern Railway and connections beyond.

4. During the period of the eight shipments Commodity Credit Corporation, an instrumentality of the United States, was engaged in administering a special emergency wartime United States Government relief program to import and distribute certain vital agricultural commodities. In the course of this program Commodity Credit Corporation entered into a contract for the purchase of a large volume of Canadian grain to be delivered to the purchaser f.o.b. Canadian-United States boundary. The eight shipments in question were shipped under said purchase contract, pursuant to which they became subject to the order of Commodity Credit Corporation upon their entry into the United States at Sweetgrass, where title passed to Commodity Credit Corporation as purchaser. Before leaving Canada they received an inspection pursuant to instructions in the Canadian bill of lading and as required by Section 55 of the Canada Grain Act.

5. On April 12, 1944, Commodity Credit Corporation issued blanket instructions to Great Northern Railway Company to divert all grain arriving at Sweetgrass to Spokane, Washington. These instructions were conveyed by a letter dated April 12, 1944, and read in part as follows:

Plaintiff's Exhibit No. 1—(Continued)

"At this time we ask that you issue blanket instructions to divert to Spokane for inspection and diversion all cars moving from Canadian points through Sweetgrass which are now billed to Commodity Credit Corporation at Ogden for inspection and diversion." A copy of said instructions appear in the Appendix.

6. Upon arrival at Spokane the shipments received an inspection pursuant to orders issued by Commodity Credit Corporation. Commodity Credit Corporation also ordered the shipments reconsigned on Great Northern straight bills of lading to Poultry Producers of Central California at Petaluma, California, a point on plaintiff's lines, Commodity Credit Corporation having received the original Canadian bills of lading, and having surrendered them to Great Northern Railway Company. A copy of the diversion order given at Spokane for each car appears in the Appendix. Great Northern Railway Company, receiving said orders, changed the billing on the cars so that they became billed to Poultry Producers of Central California, Petaluma, California, via the Great Northern Railway and connections. The cars duly arrived at Petaluma, a point on plaintiff's lines, and were delivered by plaintiff to Poultry Producers of Central California for unloading.

7. The history of the shipment in car L&N 10913 (referred to herein as the L&N car) is typical,

Plaintiff's Exhibit No. 1—(Continued)

being in all material respects similar to the history of the other seven shipments. The L&N car was shipped by Alberta Wheat Pool, Etzikom, Alberta, Canada, on April 11, 1944, to the order of Commodity Credit Corporation, Ogden, Utah, for inspection and diversion. Freight charges were prepaid by the shipper to Coutts (Sweetgrass), the balance of freight charges, i.e., the charges for transportation in the United States, to be collected from the Commodity Credit Corporation at Portland, Oregon. The shipper's memorandum copy of the original Canadian bill of lading for this shipment appears in the Appendix. Before reaching the International Boundary the car was stopped and inspected at Lethbridge, Canada, in order to comply with Section 55 of the Canada Grain Act. A copy of the inspection certificate for said inspection appears in the Appendix.

8. Pursuant to the routing provision in the original Canadian bill of lading, the L&N car was subsequently delivered by Canadian Pacific Railway Company at the Boundary Point, Sweetgrass (Coutts), to Great Northern Railway Company. Pursuant to Commodity Credit Corporation's blanket instructions of April 12, 1944, supra, par. 5, Great Northern Railway Company, receiving the car at Sweetgrass, changed its billing so that it then became billed to the order of Commodity Credit Corporation, Spokane, Washington, for inspection and diversion. A copy of the waybill showing this

Plaintiff's Exhibit No. 1—(Continued)

change appears in the Appendix. The car was accordingly moved on the Great Northern Railway to Spokane.

9. Upon arrival at Spokane the L&N car was inspected at a location known as "Hillyard." Commodity Credit Corporation transmitted to Great Northern Railway Company written instructions dated April 20, 1944 for reconsignment of the car to Poultry Producers of Central California at Petaluma upon a Great Northern uniform straight bill of lading. A copy of said instructions appears in the Appendix. Commodity Credit Corporation surrendered the original bill of lading to Great Northern Railway Company but it is not clear whether the latter issued a new bill of lading. However, it was not improper under these circumstances for Great Northern Railway Company to move the car according to instructions of Commodity Credit Corporation, even without issuing a new bill of lading, the absence of which would not affect the rates.

10. The L&N car was moved on the Great Northern Railway and connections from Spokane to Petaluma, where it was duly delivered to Poultry Producers of Central California for unloading.

11. Plaintiff as the delivering carrier submitted its original freight bill dated May 3, 1944 for freight charges accrued and unpaid on the shipment in the L&N car. Pursuant to instructions the bill was submitted to Commodity Credit Corporation at Portland, Oregon. The original freight bill appears in

Plaintiff's Exhibit No. 1—(Continued)

the Appendix. The charges were stated according to the following basis:

(a) Canadian Portion

15½c per cwt. for transportation in Canada on the Canadian Pacific Railway from the Canadian point of origin to the International Boundary at Sweetgrass (Coutts), plus a special charge of $1.00 for inspection of the car at Lethbridge, Canada. This Canadian portion of the charges was calculated according to applicable tariffs of the Canadian Pacific Railway Company and was prepaid by the Canadian shipper.

(b) United States Portion

68c per cwt. from Sweetgrass to Petaluma for the transportation beyond Sweetgrass, i.e., from Sweetgrass to Petaluma via the Great Northern Railway and connections. This rate was provided in Pacific Freight Tariff Bureau Tariff No. 241-B, Agent J. P. Haynes' I.C.C. No. 1364 as applicable to shipments from various Montana points, including Sweetgrass, to Petaluma, via the actual routing of the car over the Great Northern Railway and connections through Spokane. This tariff was published by an agent for Great Northern Railway Company and named the 68c rate as applicable to shipments originating on the Great Northern Railway at Sweetgrass and also applicable in combination with Canadian rates for shipments from Canadian points received by the Great Northern Railway at Sweetgrass.

Plaintiff's Exhibit No. 1—(Continued)

(c) Net Total

The total charges for both the Canadian and the United States portions amounted to $780.85 after allowing a credit of $146.08 for the Canadian portion which had been prepaid. The original freight bill stated the net sum due as $634.77.

12. This net total of $634.77 was paid by Commodity Credit Corporation to plaintiff, and the original freight bill calculated as above was returned by plaintiff to Commodity Credit Corporation bearing the stamped notation, "Paid, May 22, 1944."

13. Subsequently, plaintiff presented to Commodity Credit Corporation a supplemental freight bill dated July 12, 1944 for additional charges amounting to $208.44. This supplemental freight bill appears in the Appendix. The additional amount was obtained by recalculating the charges for transportation within the United States. Instead of using the original basis of the through rate of 68c from Sweetgrass to Petaluma, a higher basis was used consisting of a combination of (a) the Great Northern local tariff rate from Sweetgrass to Spokane (40c), plus (b) the local tariff rate from Spokane to Petaluma (50c). The additional charges thus computed have not been paid.

14. With respect to each of the remaining seven shipments, plaintiff submitted an original freight bill on the same basis as for the L&N car, in which the charges for transportation within the United States were calculated at the through 68c rate from

Plaintiff's Exhibit No. 1—(Continued)

Sweetgrass to Petaluma via Spokane as named in the Pacific Freight Tariff Bureau Rate Tariff No. 241-B. The charges thus computed were paid by Commodity Credit Corporation, and the original freight bills were stamped "Paid" and returned by plaintiff to Commodity Credit Corporation. Subsequently, plaintiff in each instance presented a supplemental freight bill in which the charges for transportation within the United States from Sweetgrass to Petaluma were calculated according to the sum of (a) the local 40c Great Northern Tariff rate from Sweetgrass to Spokane, plus (b) the local 50c rate from Spokane to Petaluma. The additional charges stated in the supplemental freight bills have not been paid.

15. The documents in the Appendix to this stipulation include the following documents pertaining to all of the cars:

(a) Bill of lading (Shipper's copy).

(b) Copies of Diversion Orders issued by Commodity Credit Corporation.

(c) Plaintiff's Original Freight Bill submitted to Commodity Credit Corporation and paid.

(d) Plaintiff's Supplemental Freight Bill and Agent's Record submitted to Commodity Credit Corporation and unpaid.

These documents show that some of the cars were subjected to a further change in routing while in transit, which was ordered by Agent Kirk acting for the Interstate Commerce Commission for the

Plaintiff's Exhibit No. 1—(Continued)

purpose of keeping wartime traffic moving in the Pacific Coast region. The Kirk orders and the changes in routing made thereunder did not alter the rates—in applying the tariffs to the eight shipments they should be ignored.

16. The rates used in calculating the original and supplemental freight bills were the tariff rates lawfully in effect at the time of shipment for transportation between (a) Sweetgrass and Petaluma via Spokane (68c), (b) Sweetgrass and Spokane (40c), and (c) Spokane and Petaluma (50c), respectively. The question presented is whether the shipments were entitled to the benefit of the through 68c rate from Sweetgrass to Petaluma. The answer to this question depends on whether the shipments received diversions, reconsignments, and inspections in excess of the number allowed in Item No. 143 of the Great Northern Railway Company Rules Tariff No. 1240-O, I.C.C. No. A-8071. A photostatic copy of the title page of said tariff and of page 17 containing Item No. 143 appears in the Appendix. Conformity with the provisions of Item No. 143 is required as a condition to obtaining the through 68c rate from Sweetgrass to Petaluma by Pacific Freight Tariff Bureau Tariff No. 241-B (supra, par. 11) at Item No. 350 therein.

17. Plaintiff contends that the inspection stop made in Canada on the Canadian Pacific Railway in order to comply with Section 55 of the Canada Grain Act must be included in reckoning the num-

Plaintiff's Exhibit No. 1—(Continued)

ber of inspections allowed under said Item No. 143. Under plaintiff's theory, since the shipments received one inspection in Canada and one diversion at Sweetgrass, they should bear the combination of the rates applicable to a shipment terminating at the next inspection stop, Spokane, and to a shipment originating there. The applicable rate for the movement within the United States would thus be the combination of (a) the tariff rate from Sweetgrass to Spokane (40c) plus (b) the tariff rate from Spokane to Petaluma (50c).

18. Defendants contend that the inspection stop in Canada should not be included in reckoning the number of inspections, diversions, and reconsignments permitted by Item No. 143 in the Great Northern Rules Tariff, on the ground that the Canadian inspections were made before the shipments became subject to said Great Northern Rules Tariff. Under this theory, in applying Item No. 143 defendants would be entitled to as many inspections, diversions and reconsignments as if the shipments had actually originated at Sweetgrass. If the cars had in fact been loaded at Sweetgrass the flat through 68c rate from Sweetgrass to Petaluma would have been applicable, since the only inspections, diversions, or reconsignments under Item No. 143 would have been the inspection at Spokane (Hillyard) and the reconsignment at Spokane.

19. If plaintiff's theory is correct, plaintiff is entitled to the principal sum claimed in the com-

Plaintiff's Exhibit No. 1—(Continued)

plaint, $1,954.14. If defendants' theory is correct, plaintiff is not entitled to any relief.

20. The grain composing the eight shipments was all sold by Commodity Credit Corporation to Poultry Producers of Central California on a delivered basis at Petaluma, Commodity Credit Corporation to pay transportation on said shipments to Petaluma. If plaintiff is entitled to any additional freight charges from defendant Poultry Producers of Central California for such transportations to Petaluma, then defendant Poultry Producers of Central California is entitled to reimbursement therefor by defendant Commodity Credit Corporation. In no event is plaintiff entitled to recover the additional freight charges from more than one defendant.

Dated: February 15, 1949.

/s/ A. T. SUTER,

Attorneys for Plaintiff, Petaluma and Santa Rosa Railroad Company.

FRANK J. HENNESSY,

U. S. Attorney, Attorney for Defendant Commodity Credit Corporation,

By /s/ C. ELMER COLLETT,

Asst. U. S. Attorney.

/s/ CARL R. SCHULZ,

Attorney for Defendant Poultry Producers of Central California.

[Endorsed]: Filed Feb. 16, 1949.

[Endorsed]: Filed U.S.C.C.A. Dec. 16, 1949.

PLAINTIFF'S EXHIBIT NO. 2

In the United States District Court for the Northern District of California, Southern Division

No. 28,025-R

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION, a corporation, POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation, et al.,

Defendants.

SUPPLEMENTAL STIPULATION

I.

The parties hereto have agreed by stipulation dated February 15, 1949 that if plaintiff is entitled to additional freight charges from the defendant Poultry Producers of Central California the latter is entitled to reimbursement therefor by the defendant Commodity Credit Corporation. This supplemental stipulation is entered into between plaintiff Petaluma and Santa Rosa Railroad Company and defendant Commodity Credit Corporation.

II.

Prior to October 20, 1942 the applicable reconsigning tariff provision provided that at least

Plaintiff's Exhibit No. 2—(Continued.)

three inspections and diversions were permitted on each carload shipment of wheat. Because of wartime conditions and the necessity of conserving cars and equipment tariff provision Item 143 of Section 2, Great Northern Railway Company Tariff 1240-O, was made effective October 20, 1942.

"(E) Item No. 143. Grain, Seeds, etc., Placed on Track for Inspection and Held for Disposition Orders.

"Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

"In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it be-

Plaintiff's Exhibit No. 2—(Continued.)

comes subject to combination of rates as provided in this rule.

"(E) Expires six months after the termination of the present war.

"(The form of this publication is permitted by authority of the Interstate Commerce Commission permission No. 9014 of May 7, 1942.)"

This tariff provision restricted the number of inspections and diversions permitted on a carload shipment of wheat. At the time the latter tariff provision was made effective no shipments of wheat were being transported from Canadian points to the United States. Due to this fact the applicability of said tariff provision to shipments of wheat originating in Canada was not contemplated in the framing of this tariff rule.

III.

The said tariff rule quoted herein was amended to become effective on February 16, 1949 as indicated in the exhibit attached hereto. The amendment provided for the addition of the following phrase. "or the point where the car comes in possession of carriers within the United States." The said exhibit attached hereto is Publication Announcement No. 154, dated November 12, 1948, and bears the statement, "The above mentioned change is for clarification purposes."

Dated: February 15, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

Plaintiff's Exhibit No. 2—(Continued.)

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney, Attorneys for Defendant,
Commodity Credit Corporation.

/s/ A. T. SUTER,
Attorney for Plaintiff.

(Copy)

National Diversion and Reconsignment Committee
2048 Transportation Building
Chicago 5, Illinois

November 12, 1948.

Publication Announcement No. 154
(Supplement No. 5 to P.A. No. 119)
(Last Amendment to P.A. No. 119 is P.A. No 153)

Rules and Charges Governing Grain: Seeds (Field or Grass), Screenings from Grain, Unground, Containing Not More Than 5 per cent of Flaxseed, Soybeans, Hay, Straw, Corn Husks or Corn Shucks, and Pummies, Unground, Held for Inspection and Disposition Orders.

The National Diversion and Reconsignment Committee has approved the following change in the Rules and Charges governing Grain; Seeds (Field or Grass); Screenings from Grain, Unground, containing not more than 5 per cent of Flaxseed, Soybeans, Hay, Straw, Corn Husks or Corn Shucks,

Plaintiff's Exhibit No. 2—(Continued.)

and Pummies, unground, held for Inspection and Disposition Orders, applicable Within Official Classification, Southern Classification and Western Classification Territories, and all railroads operating in the territories named should revise their tariffs accordingly to take effect February 16, 1949, on statutory notice:

Substitute the following for the second paragraph of Rule 5, captioned "Number of Inspections Allowed";

In applying this rule, the number of stops for inspection (or diversion or reconsignment without inspection) shall be reckoned from the last point of loading of car, or the point where the car comes in possession of carriers within the United States, or from the point at which it becomes subject to combination of rates as provided in this rule.

(The foregoing conforms to record made at meeting of the National Diversion and Reconsignment Committee held September 22, 1948, Docket Advice No. NDR-1182, Topic No. 13.)

(The above mentioned change is for clarification purposes.)

E. V. HILL,
Acting Chairman.

File NDR-450

[Endorsed]: Filed U.S.C.C.A. Dec. 16, 1949.

Rates and charges published in this tariff are subject to the increases provided in Item X-148 ccessive issues thereof.
The operation of portions of this tariff referred to in Item No. 1 is suspended as provided id Item.

N. Ry. Cal. R. C. No. 75.
ancels Cal. R. C. No. 63.
. Ry. Minn. R. C. No. 940.
ncels Minn. R. C. No. 853.
. Ry. Mont. R. C. No. 652.
ncels Mont. R. C. No. 581.
Ry. N. D. P. S. C. No. 231.
cels N. D. P. S. C. No. 212.

G. N. Ry. C. T. C. No. 2302.
Cancels C. T. C. No. 2268.
G. N. Ry. P. S. C. of Wis. No. 198.
Cancels P. S. C. of Wis. No. 175.
G. N. Ry. P. U. C. of I. No. 251.
Cancels P. U. C. of I. No. 242.
G. N. Ry. P. U. C. Ore. No. 643.
Cancels P. U. C. Ore. No. 611.

C.T.C = Canadian Transport

G. N. Ry. P. U. C. of S. D. No. 279.
Cancels P. U. C. of S. D. No. 265.
G. N. Ry. W. D. P. S. No. 1451.
Cancels W. D. P. S. No. 1424.
G. N. Ry. I. C. C. No. A-8071.
Cancels I. C. C. No. A-7892.

G. N. Ry. G. F. O. No. 1240-O.
Cancels G. F. O. No. 1240-N.

7-16-44

Cancels 1240-N

GREAT NORTHERN RAILWAY COMPANY

—In Connection With—

FARMERS' GRAIN AND SHIPPING COMPANY. (FX 2, No. 11.)
THE MIDLAND RAILWAY COMPANY OF MANITOBA. (FX 5, No. 1.)

LOCAL AND JOINT FREIGHT TARIFF

—Providing—

RULES AND CHARGES

—Governing—

Diversion or Reconsignment of Freight and Holding of Cars for Surrender of Bills of Lading or Written Orders, or Inspection at points on the above named lines.

OCT 6 1942

ISSUED SEPTEMBER 16, 1942.

EFFECTIVE OCTOBER 20, 1942.
(Except as otherwise provided herein.)

BURNHAM,
ight Traffic Manager,
reat Northern Railway Co.,
ST. PAUL, MINN.

B. S. MERRITT,
Western Traffic Manager,
Great Northern Railway Co.,
SEATTLE, WASH.

Issued by
W. D. O'BRIEN,
General Freight Agent,
Great Northern Railway Co.,
175 East Fourth Street,
ST. PAUL, MINN.

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63

SECTION 2—Continued.

ES AND CHARGES GOVERNING GRAIN; SCREENINGS FROM GRAIN, UNGROUND, TAINING NOT MORE THAN 5 PER CENT OF FLAXSEED; SEEDS (FIELD OR GRASS); Y (SOYA OR SOJA) BEANS; HAY; STRAW; CORN HUSKS OR CORN SHUCKS, AND MMIES, UNGROUND; CARLOADS, STOPPED FOR INSPECTION AND DISPOSITION RDERS INCIDENT THERETO; ALSO RULES AND CHARGES COVERING GRAIN OR SEEDS, CARLOADS, HELD OR STOPPED AT SAMPLING POINT.

Item No. 143. Grain, Seeds, etc., Placed on Track for Inspection and Held for Disposition

's.

ot more than two inspections (or one inspection in addition to a diversion or reconsignment without tion) en route and one inspection (or diversion or reconsignment) within the switching limits of the ation at which the car is unloaded will be permitted; Provided, that if, after car has received the two tions (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is quently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject combination of tariff rates applicable on a shipment terminating at and on a shipment originating at int at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date ment from point of origin.

applying this rule, the number of stops for inspection (or diversion or reconsignments without in- on) shall be reckoned from the last point of loading of car or from the point at which it becomes subject ubination of rates as provided in this rule.

Expires six months after the termination of the present war.

The form of this publication is permitted by authority of the Interstate Commerce Commission per- n No. 9014 of May 7, 1942.)

Item No. 145. Cars billed to team tracks or industries.

ars billed direct to public team tracks, or to elevators, mills of other industries, within the switching of the billed destination, and there inspected and delivery taken, will not be subject to the charge ed in Section 1.

Item No. 150. Disposition order after inspection.

The disposition order received after the inspection will be considered as being in lieu of the consignment ctions under which the cars arrived at inspection point.

n shipments Consigned "To Order," an order to divert or reconsign, or a disposition order, under rules will not be accepted or become effective until the original bill of lading is surrendered for can- on, endorsement or exchange, or in its absence satisfactory bond of indemnity executed in lieu thereof, er approved security given.

Item No. 155. Sampling.

arload shipments of Grain or Seeds originating on the lines of this company or connections, and billed nneapolis, St. Paul, Duluth, Minn., or Superior, Wis., may be set out for carrier's convenience free of e at any intermediate grain sampling station, established with the approval of state authorities, for the se of permitting the withdrawal of samples by State or Federal authorities.

rain or Seeds billed by the shipper to a sampling station, or to Minneapolis, St. Paul, Duluth, Minn., perior, Wis., or beyond, with a notation on bill of lading to "Hold for sampling and orders" at the ing station, will be held at the designated point for the purpose indicated at a charge of $4.40 per car Exceptions 1, 2 and 3), which charge is to cover switching from sampling track, to and from hold track econsignment or reforwarding the car to destination in same general direction.

Note A—Orders reading "Hold for Inspection" will be considered as the equivalent of "Hold for sam- and orders."

Note B—The charge of $4.40 provided in Section 4 does not cover any subsequent service at final ation, with respect to which service, Sections 1, 2 and 3 apply. The charge provided in Section 1 ot apply at intermediate sampling stations.

②Exception 1—No charge will be made on Grain or Seeds originating at the following points:

Badger, Minn.	①Greenbush, Minn.	Roseau, Minn.	Warroad, Minn.
Fox, Minn.	Mandus, Minn.	Salol, Minn.	

②Exception 2—From stations shown in Column A below to Minneapolis, Minnesota Transfer, or ul, Minn., and stations taking same rates, the charge of $4.40 per car will apply, except that in no case the total transportation charge, including the hold charge, exceed the charges on a like shipment of or Seeds from station shown opposite such station in Column B below without the stop charge.

Column A	Column B
Greenbush.....Minn. Strathcona..... "	} Badger.....Minn.

(Item No. 155 continued on following page)

①Applies only on traffic destined to Duluth, Minn., Superior, Wis., and stations taking same rates.
②Applies only on Interstate Traffic.

Plaintiff's Exhibit No. 2—(Continued)
(Copy)

United States Department of Agriculture
Commodity Credit Corporation
304 Artisans Building
Portland 5, Oregon

April 12, 1944.

Great Northern Railway Company
American Bank Building
Portland, Oregon
Attention: Mr. Osborne

Gentlemen:

This will confirm our telephone conversation of April 11 in which we asked that you cancel our instructions of April 10 regarding stopping of all cars at Great Falls for inspection and diversion which were billed to Commodity Credit Corporation at Ogden for inspection and diversion.

At this time we ask that you issue blanket instructions to divert to Spokane for inspection and diversion all cars moving from Canadian points through Sweetgrass which are now billed to Commodity Credit Corporation at Ogden for inspection and diversion.

Very truly yours,
EARL C. COREY,
Regional Director.

By/s/ C. J. SEELY.

(Form PA)

For use in connection with the Form of Order of Bill Lading approved by the Board of Transport Commissioners for Canada by General Order No. 42 of 12th July 1932.

CANADIAN PACIFIC RAILWAY COMPANY

SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

Shipper's No. _____

Agent's No. _____

GIVEN, subject to the conditions and limits in effect on the date of issue of this Shipping Order.

KETTLEON alta April 11 1944

alta wht Pool

described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said goods over all or any portion of said route to destination, and as to each party at any time interested in all or any of said goods, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

No agent or employee of the Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the goods. Inspection of goods covered by this Order will not be permitted unless provided by law or unless permission is indorsed on the original Bill of Lading or given in writing by the shipper.

The Rate of Freight from _____ is in Cents per 100 Lbs. If Special Rate Per _____

Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column	Class or Rate	Check Column

(Mark Address—Not for purpose of Delivery)

Consigned to ORDER OF Canadian Credit Corp.
for inspection
Ogden and Diversion
Ogden
Sweet Grass CN Butte Thence V.P.

Province or State of Utah County of _____

Province or State of _____ County of _____

Car Initial I + N Car No. 10913

DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	Class or Rate	Check Column
No. Bulk Wheat Marion Bess	93600		
Property of U.S. Government			
Not subject to Transportation Tax			
C.C.C. Exchange Purchase 596-A			
Canadian Customs Entry Form to			
be supplied by James Richardson & Sons Ltd, Calgary			
Inspection Certificate required in duplicate			
by Alberta Wheat Pool Calgary			
Can Cur 596a			
Wheat Board Permit #76389			
wh 14 1374			
CCC-25-A			
7/30731-02			

If charges are to be prepaid, write or stamp here, "To be Prepaid."
Prepay freight to Coutts, Balance of charges to be collected from C.C.C. Portland, Oregon

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

Charges Collected: $ _____

CANADIAN PACIFIC RAILWAY
APR 11
KETTLEON

alta wht Pool
a/f Fitts
Shipper

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Printed in Canada

Routed by
A. GERKEN, A. G. F. A.
GREAT NORTHERN RAILWAY
830 AMERICAN BANK BLDG.
PORTLAND, OREGON

Divert on Straight Bill of Lading

To: Poultry Producers of Central Calif.

Destination: Petaluma, California

Route: GN to Chemult-SP-Mar-PSR

Do not Weigh: This car moving on official Canadian weight. Collect from C.C.C.

CONDITIONS

...1. The Carrier of any of the goods herein described shall be liable for ...e thereof or damage thereto except as hereinafter provided.

...2. In the case of shipments from one point in Canada to another point in ..., or where goods are shipped under a joint tariff, the Carrier issuing this bill ..., in addition to all other liability hereunder, shall be liable for any loss, dam... to such goods from which the other Carrier is not by the terms of this ...ding relieved, caused by or resulting from the act, neglect or default of any ...rrier to which such goods may be delivered in Canada, or under such joint ...ers whose line or lines such goods may pass in Canada or under such joint ...ts case of proving that such loss was not so caused or did not so result being ...Carrier issuing this bill of lading. The Carrier issuing this bill of lading ...entitled to recover from the other Carrier on whose line or lines the loss, dam... may be the said goods shall have been sustained the amount of such loss, ...or injury as it may be required to pay hereunder, as may be evidenced by ...ment, or transcript thereof. Nothing in this section shall deprive ...of this bill of lading as party entitled to the goods of any remedy or right ...which he may have against the Carrier issuing this bill of lading or any ...rrier.

...3. The Carrier shall not be liable for loss, damage, or delay to any of the ...ds described, caused by the act of God, the King's or public enemies, riots, ...ilect, or inherent vice in the goods, or the act or default of the shipper or ...r; or differences in weights of grain, seed, or other commodities caused by nat... ...hrinkage or discrepancies in elevator weights when the elevators are not ...by the Carrier, unless the weights are evidenced by (Government certificate) ...curity of law or by quarantine. For loss, damage, or delay, except where ...to be performed by the Carrier or its agents, caused by fire occurring after ...ed hours (exclusive of legal holidays), or in the case of bonded goods seventy... (exclusive of legal holidays), after written notice of the arrival of said ...destination or at port of export (if intended for export and not covered by a ...bill of lading) has been sent or given, the Carrier's liability shall be that of ...ouse only. Except in case of negligence of the Carrier (and the burden of ...roduce from such negligence shall be on the Carrier), the Carrier shall not ...for loss, damage or delay occurring while the goods are stopped and held in ...on the request of the party entitled to make such request. When in ac... with general custom, on account of the nature of the goods, or at the ...of the shipper, the goods are transported in open cars, the Carrier (except ...of loss or damage by fire, in which case the liability shall be the same as ...goods had been carried in closed cars) shall be liable only for negligent, ...burden of proving freedom from such negligence shall be on the Carrier.

...4. No Carrier is bound to transport said goods by any particular train ...or in time for any particular market or otherwise than as required by law ...specific agreement endorsed hereon. Every Carrier in case of physical ...shall have the right to forward said goods by any railway or route between ...of shipment and the point of destination; but if such diversion be from a ...ater route the liability of the Carrier shall be the same as though the entire ...were by rail.

...amount of any loss or damage for which any Carrier is liable shall be con... the basis of the value of the goods at the place and time of shipment under ...f lading (including the freight and other charges if paid, and the duty if ...payable and not refunded), unless a lower value has been [illegible] ...the shipper or has been agreed upon or otherwise established as ... upon which the rate is based, in any of which events such lower value shall ...amount to govern such computation, whether or not the loss or damage ...is due to negligence.

...under the terms of the classification or special reduced tariffs, the goods ...as owner's risk, such conditions are intended to cover only such risks as ...rily incidental to transportation and shall not relieve the Carrier from ...y loss, damage or delay which may result from any negligence or ...f the Carrier, its agents or employees, and the burden of proving freedom ...egligence or omission shall be on the Carrier.

...of loss, damage or delay must be made in writing to the Carrier at the ...livery, or to the Carrier at the point of origin, within four months after ...the goods, or in case of failure to make delivery, then within four months ...onable time for delivery has elapsed. Unless notice is so given the Carrier ...e liable.

...arrier or party liable on account of loss of or damage to any of said goods, ...ing to the insured the premiums paid in respect thereof, shall have the ...of any insurance that may have been effected upon or on account of said ...s; but this shall not avoid the policies or contracts of insurance.

Sec. 5. Grain in bulk consigned to a point where the Carrier has no elevator or warehouse, or where there is a public or licensed elevator or warehouse may be there delivered and placed with other grain of the same kind and grade without respect to ownership: Provided that this shall not apply to a point of final delivery if it is otherwise expressly noted hereon, unless the grain is not promptly unloaded after written notice of arrival has been sent or given to the person named herein. Grain so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 6. Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays), or in the case of bonded goods, within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station, or place of delivery or a warehouse of the Carrier, subject to a reasonable charge for storage and to a reasonable charge for demurrage in car, at the option of the Carrier. Such written notice of the Carrier's intention to do so has been sent or given, he removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the risk of the owner and without liability on the part of the Carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Goods in carloads shipped from a private siding or a station, wharf, or landing where there is no duly authorized agent, shall be at the risk of the owner until the car is filed or bill of lading is issued by the Carrier, and thereafter shall be at the risk of the Carrier. Goods in carloads destined to a private siding, or station, wharf, or landing where there is no duly authorized agent, shall be at the risk of the Carrier until placed on the delivery siding.

All goods shall be subject to necessary cooperage and boiling at owner's cost.

Sec. 7. No Carrier shall be bound to carry any documents, specie, or any articles of extraordinary value not specifically rated in the published classification or tariffs unless a special agreement to do so (the duty of obtaining such special agreement to be on the Carrier when the nature of such goods is disclosed hereon) and a stipulated value of the articles are endorsed hereon. If such goods are carried without a special agreement and the nature of the goods is not disclosed hereon the Carrier shall not be liable for any loss or damage thereto.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said goods, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the goods shipped are not those described in this bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 4 hereof, and except as provided hereafter, if all or any part of said goods is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statute or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the sea, sea, or other waters; or from explosion, bursting of boilers, or breakage of shafts not arising from the negligence of the Carrier, or from any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation or from [illegible] of the vessel. And any vessel carrying any or all of the goods shall have liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage or car ferriage across rivers, or in lake or other harbors, and the liability for such lighterage or car ferriage shall be governed by the other sections hereof.

If the goods are being carried under a tariff which provides that any Carrier or Carriers party thereto shall be liable for loss from perils of the sea, then as to such Carrier or Carriers the provisions of this section shall be read and have effect with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Every party, whether principal or agent, shipping explosives or dangerous goods without previously and on the face thereof and to the agent of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at [illegible] risk and expense, or destroyed without compensation.

Sec. 11. Any alteration, [illegible] or erasure in this bill of lading shall be signed or initialed in the margin by the agent of the Carrier issuing the same and if not so signed or initialed shall be void for that part, and this bill of lading shall be enforceable according to its original tenor.

Plaintiff's Exhibit No. 2—(Continued)

Dominion of Canada

No. 14903

The Department of Trade and Commerce

Board of Grain Commissioners for Canada
Western Grain Inspection Division

This Certifies that there was inspected
For Account of Alberta Wheat Pool

Car Initial: L & N.

Car Number: 10913.

Station Shipped From: Etzikom.

Date and Place Inspected: Lethbridge, Apr. 19, 1944.

Kind of Grain: Wheat.

Grade: Manitoba One (1) Northern.

Dockage: 1%.

Remarks .....

Duplicate

F. S. LUDLAM,
Chief Grain Inspector,
Winnipeg, Man.

W. K.,
Grain Inspector.

Plaintiff's Exhibit No. 2—(Continued)

Collect from C.C.C.

Divert on Straight Bill of Lading

To: Poultry Producers of Central Calif.

Destination: Petaluma, California

Route: GN to Chemult-SP-NWP-PSR

Do not Weigh: This car moving on Official Canadian Weight. Collect from C.C.C.

War Food Administration
Commodity Credit Corporation
304 Artisans Building
Portland 5, Oregon

April 20, 1944

Great Northern Railway Company
Portland, Oregon

Car of wheat L&N 10913 Wt. 93,600

Shipped from Etzikom, Alta. Date 4-11-44

Consigned to Order of Commodity Credit Corp.

Destination Spokane, Wn. (For Insp.&Div.)

Notify Same

At Spokane, Wn.

Route CP Sweet Grass GN Butte thence UP

Please divert as shown at top of this Diversion request.

Plaintiff's Exhibit No. 2—(Continued)

Confirming our telephone diversion of April 20, 1944 We are surrendering the original order B/L.

C/P 596-A

jh

/s/ EARL C. COREY

EARL C. COREY

Regional Director

[Stamped]: Received May 1, 1944. G. N. Ry. Traffic Dept.

S B O

105 CANADIAN PA C RAILW/ COMPANY. 105

BULK GR FREIGHT WAYBILL

TO BE USED FOR CARLOAD SHIPMENTS ONLY

HANDLED FOR C.P.R.

WEIGHT IN TONS — GROSS / NET

AND NUMBER — C. L. TRANSFERRED TO OR L. C. L. LOADING NO.

10913

DATE — APRIL 18TH 44 — WAYBILL NO

STATION — PROV. OR STATE

ALUMA CALIFORNIA

Spokane Wash

FROM STATION

(7681)

TO STATION — PROV. OR STATE

Centes AT Sweet Grass

Authority H.S. 4-18-44

FULL NAME OF SHIPPER

THE COMMODITY CREDIT CORP

ALBERTA WHEAT POOL

W EACH JUNCTION AND CARRIER IN ROUTE ORDER TO INATION OF WAYBILL.)

COUTTS ALTA

COUTTS ONT

DESTN. CHEMULT SP NWP PSR

Kirk order 059

D. N. RAILWAY CO.

GREAT NO

ACCEPTED AT HILLY

State Grain

ND ADDRESS.

COMMODITY CREDIT CORPN

INSPN & DIVERSION

OGDEN UTAH

COMMODITY CREDIT CORPN

OGDEN UTAH

ATION AND ADDITIONAL ROUTING

Y PRODUCERS OF CENTRAL CALIFORNIA

S (REGARDING MILLING, WEIGHING, ETC.)

TOM ENTRY SUPPLIED BY

RICHARDSON & SONS CALGARY

August 6-1780

KIND OF GRAIN	RATE AUTH'Y ★	WEIGHT	RATE	FREIGHT
BULK WHEAT	MORE OR LESS			
S 7980701/2	TO COUTTS	93600 93345	15½ 68	1.00
25/A	INSPN BEYOND			

PN CERTS IN DUPE TO ALBERTA WHEAT POOL CALGARY

PERTY OF US GOVT NOT SUBJECT TO TRANSPN TAX

DO NOT WEIGH MOVING ON CANADIAN OFFICIAL WEIGHTS

SEND FRT BILLS TO THE C C C PORTLAND FOR COLLECTION

JUNCTION STAMPS IN SPACE AND ON BACK

CANADIAN PACIFIC RAILWAY

APR 17 1944

PETALUMA, CALIF.

APR 23 1944

PASCO

ADDITIONAL JUNCTION STAMPS AND STANDARD STAMPS ARE PLACED ON BACK OF WAYBILL

105. CANADIAN PACIFIC RAILWAY COMPANY 105.

PETALUMA, CALIF. Station MAY 3, 1944 19

Consignee POULTRY PRODUCERS OF CENT. CALIF. Freight Bill No. 5498

Destination PETALUMA, CALIF. Route CP COUTTS ALTA GN CHEMULT SP NWP PSR
(POINT OF ORIGIN TO DESTINATION)

To **Petaluma and Santa Rosa Railroad Company,** Dr., For Charges on Articles Transported:

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
ETZIKOM, ALTA.	4 12 44 C-44	C.C. C.	L&N 10913

POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.
		AGRMT. A-1780	

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
BULK WHEAT 1560 BUSHELS M/L	93395	.15½	TO SWEET GRASS		
		.68	BYD		
		.83½	BYD		
			779.85		
SEALS 798070½ CCC 25/A. INSPN CERTS IN DUP TO ALBERTA WHT POOL CO. CALGARY PROP US GOVT NOT SUBJ TO TRANSPN TAX. CUSTOMS ENTRY SUPPLIED BY JAS RICHARDSON & SONS CALGARY. G.N. RY CO. INSP. AT HILLYARD BY ST GR. INSP. DO NOT WEIGH MOVING ON CANADIAN OFFICIAL WTS.			1.00	INSP.	
			780.85		780.85
		P.P. AT ORIGIN			146.08
SEND BILLS TO THE CCC PORTLAND FOR COLLECT. FOR COLLECTION					634.77

LOCATION Warehouse | Post or Section

DIVERTED AT SPOKANE, GN RY CO 4/20 CA G DV 1392 AUTHY M. J.A. ROBASSE, AGT. OFFICIAL INSP. NWP RR CO., PETALUMA, CALIF.

We Received payment for the Company 19

Agent

MAY 2 1944 Paid

Cashier or Collector

Total

Prepaid

To Collect

Make Checks Payable to the Company

SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS.
THE ORIGINAL PAID FREIGHT BILL MUST BE SURRENDERED FOR OVERCHARGES TO BE REFUNDED AND MUST ACCOMPANY CLAIMS FOR OVERCHARGE, LOSS OR DAMAGE.

A. L. [illegible]

This Company appreciates suggestions from the public which may be helpful in improving its service. The management welcomes, in particular, reports of unusually satisfactory and courteous treatment received at its offices of our employees as it by commending such ... the usefulness of the Company's organization to the public may be increased. President and General Manager, 65 Market Street, San Francisco, California.

PETALUMA CALIF Station JULY 13 1944 19

Consignee POULTRY PROD OF CENT CALIF Freight Bill No. 5498

Destination PETALUMA CALIF Route CP-GN-SP-NWP-PSR (MAY 3 1944)
(POINT OF ORIGIN TO DESTINATION)

To **Petaluma and Santa Rosa Railroad Company,** Dr., For Charges on Articles Transported:

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
ETZIKOM ALTA	4-12-44 C-44	C.C.C.	L&N 10913

POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
AS BILLED C/L BULK WHEAT	93395	15½ 68 83½	1.00 779.85 780.85	P.P. INSPN	780.85 146.08 634.77
AS CORRECTED DO DO (GN INSPECTION AT SPOKANE-SWEETGRASS SPOKANE COMBN, CAR ORIGINALLY BILLED	93395	15½ 40 50 105½	985.32	P.P.	989.39 146.08 843.21
		INSPN	1.00		
		INSPN SPOKANE	3.87		
			989 39		

LOCATION — Warehouse | Post or Section

TO OGDEN.)

Received payment for the Company _____ Agent

Per BAL TO COLLECT Cashier or Collector

Total _____

Prepaid _____

To Collect 208.44

Make Checks Payable to the Company

SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS.
THE ORIGINAL PAID FREIGHT BILL MUST BE SURRENDERED FOR OVERCHARGES TO BE REFUNDED AND MUST ACCOMPANY CLAIMS FOR OVERCHARGE, LOSS OR DAMAGE.

This Company appreciates suggestions from the public which may be helpful in improving its service. The management welcomes, in part reports of unusually satisfactory and courteous treatment received by commending as its the usefulness of the Company's organization to the public may be increased. President and General Manager, 65 Market Street, San Francisco, California.

PETALUMA CALIF Station, JULY 12 1944 19

Consignee POULTRY PRODUCERS OF C.C. Freight Bill No. 5498

Destination PETALUMA CALIF Route CP GN SP NWP PSR (MAY 3 1944)
(POINT OF ORIGIN TO DESTINATION)

To **Petaluma and Santa Rosa Railroad Company,** Dr., For Charges on Articles Transported:

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
ETZIKOM ALTA	4/12/44 C 44	C.C.C.	L&N 10913

POINT AND DATE OF SHIPMENT | CONNECTING LINE REFERENCE | PREVIOUS WAYBILL REFERENCES | ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
					780.85
AS BILLED		15½			146.08
CL BULK WHEAT		68			
1560 BU	93395	83½	1.00	INSPN	634.77
			779.85		
			780.85		
AS CORRECTED					
DO DO	93395	15½	TO COUTTS		989.29
		40	TO SPOKANE	P.P.	146.08
(GN INSPECTION AT SPOKANE SWEETGRASS		50			
SPOKANE COMBN CAR ORIGINALLY BILLED		105½	985.32		
AT OGDEN)			1.00		843.21
			2.97		
			989.29		

Total _____

Date Notified Reference to Corrections, etc.

ORIGINAL DESTINATION-OGDEN UTAH-DIVERTED AT SWEETGRASS TO SPOKANE
AUTH - H.S. 4/18/44 DIVERTED AT SPOKANE AFTER INSP TO PETALUMA
AUTH GAG - DV 1992

Prepaid _____

To Collect ___ 208.44

Make Checks Payable to the Company

Subject to Demurrage After 7 A.M. of

SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS.

YU-PSR-151

[Endorsed]: Filed U.S.C.C.A. Dec. 16, 1949.

MARGIN FOR BINDING
MAKE NO NOTATIONS ON THIS MARGIN

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Certificate of Clerk of Municipal Court on Removal Contains: Copies of

Complaint for Freight Charges

Petition for Removal of Cause to United States District Court

Bond for Removal

Notice of Petition and Bond for Removal

Petition for Removal of Cause to United States District Court

Bond for Removal

Order for Removal

Answer of Commodity Credit Corporation

Answer to Complaint and Cross-Claim

Opinion

Proposed Amendments to Findings of Fact and Conclusions of Law Lodged by Plaintiffs

Findings of Fact and Conclusions of Law

Judgment

Notice of Motion for New Trial

Order Denying Motion for New Trial

Notice of Appeal

Defendant's Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1, 2 and 3.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 14th day of December, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12427. United States Court of Appeals for the Ninth Circuit. Commodity Credit Corporation, Appellant, vs. Petaluma and Santa Rosa Railroad Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 14, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12,427

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

PETALUMA & SANTA ROSA RR. CO.,
Appellee.

DESIGNATION OF POINTS RELIED ON BY APPELLANT

As Statement of Points required by Subdivision 6, Rule 19, appellant designates the following:

(1) The District Court erred in finding, concluding and holding that the provisions of the Great Northern Railway Rules Tariff in effect during April and May of 1944 were applicable to the shipments involved in this action prior to their crossing the Canadian border.

(2) The District Court erred in finding, concluding and holding that the number of inspections and/or diversions allowed each of the shipments must be computed from the point of origin in Canada.

(3) The District Court erred in finding, concluding and holding that the charges to be assessed for transportation on the shipments in the United States from Sweetgrass to Petaluma were properly

computed on the basis of a combination of rates from Sweetgrass, Montana, to Petaluma, California.

(4) The District Court erred in finding, concluding and holding that defendant, Commodity Credit Corporation, was lawfully obligated to pay unpaid freight charges on the shipments in the sum of $1,954.14.

(5) The District Court erred in not finding, concluding and holding that the provisions of the Great Northern Railway Rules Tariff were not applicable to the shipments during their movement in Canada.

(6) The District Court erred in not finding, concluding and holding that the provisions of the Great Northern Railway Rules Tariff became applicable from the point where the shipments came into possession of the Great Northern Railway within the United States.

(7) The District Court erred in not finding, concluding and holding that the provisions of the Great Northern Railway Rules Tariff Item No. 143 were ambiguous and were meant to be applicable at "the point where the car came in possession of carriers within the United States".

(8) The District Court erred in not finding, concluding and holding that Sweetgrass, Montana, was a point at which the shipment had been subject to combination of rates as to its previous movement within the meaning of the Great Northern Railway Rules Tariff Item No. 143.

(9) The District Court erred in not finding, concluding and holding that the applicable rate was the flat rate from Sweetgrass, Montana, to Petaluma, California.

(10) The District Court erred in granting judgment to plaintiff.

(11) The District Court erred in not granting judgment to defendant.

Dated: December 28, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Appellant.

Appellant designates the entire record to be printed, including plaintiff's Exhibits 1 and 2, and the following portions of Exhibit 3: The Great Northern Railway Company Rules and Charges, C.C.C. Blanket Diversion Order, and documents pertaining to Car L & N.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 29, 1949.

No. 12427

In the United States Court of Appeals for the Ninth Circuit

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

H. G. MORISON,
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INDEX

AUTHORITIES CITED

In the United States Court of Appeals for the Ninth Circuit

No. 12427

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Suit was filed in the Municipal Court of the City and County of San Francisco, California, by Petaluma and Santa Rosa Railroad Company, a California corporation, against Commodity Credit Corporation, a Delaware corporation, and Poultry Producers of Central California, a corporation, for supplemental freight charges (R. 3). The suit was removed to the United States District Court for the Northern District of California, Southern Division (R. 18). The suit arose under a law regulating commerce (49 U. S. C. sec. 6), and the District Court had original jurisdiction (28 U. S. C. (1940 Ed.), sec. 41 (8)). The suit was therefore removable to the District Court

from the Municipal Court (28 U. S. C. (1940 Ed.), sec. 71).[1]

Following answers and trial upon stipulations of fact (R. 19, 23, 49), the District Court entered final judgment for plaintiff (R. 43, 47) from which Commodity Credit Corporation duly appealed (R. 47). This Court now has jurisdiction to review the District Court's judgment (28 U. S. C. sec. 1291).

QUESTION PRESENTED

The question presented is the determination of the lowest freight rate under the tariffs of the United States railroads from Sweetgrass, Montana, on the Canadian boundary, to Petaluma, California, applicable to several carloads of grain which were imported from Canada under a wartime Federal relief program. This involves the interpretation of a tariff rule published by the Great Northern Railway Company.

TARIFF PROVISION

a. Great Northern Rule 143

Great Northern Railway Company Rules Tariff (R. 66), Item No. 143, reads as follows (R. 67):

> ITEM NO. 143. GRAIN, SEEDS, ETC., PLACED ON TRACK FOR INSPECTION AND HELD FOR DISPOSITION ORDERS

[1] The District Court's jurisdiction was not affected by the 1948 Revision of Title 28 of the U. S. Code. See 28 U. S. C. sec. 1337, 1441. Commodity Credit Corporation, the Delaware corporation, has been dissolved pursuant to the Act of June 29, 1948, ch. 704, 62 Stat. 1075, 15 U. S. C. (Supp. II) sec. 714n, o. It retains corporate existence for the purpose of this appeal for three years following dissolution. See Revised Code of Delaware, chap. 65, sec. 42.

Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car *or* from the point at which it becomes subject to combination of rates as provided in this rule. [Italics added.]

Expires six months after the termination of the present war.

(The form of this publication is permitted by authority of the Interstate Commerce Commission permission No. 9014 of May 6, 1942.)

b. Amendment of the rule

The second paragraph of the text of Rule 143 was amended by the addition of a phrase by the carriers

in November 1948, effective February 16, 1949, so as to read as follows:

> In applying this rule, the number of stops for inspection (or diversion or reconsignment without inspection) shall be reckoned from the last point of loading of car, *or the point where the car comes in possession of carriers within the United States,* or from the point at which it becomes subject to combination of rates as provided in this rule. [Our italics show the addition.]

The notice of this amendment by the carriers contained the following statement: *The above-mentioned change is for clarification purposes"* (R. 63–65). [Italics ours.]

The question is whether a stop for inspection in Canada, which was required by Canadian law and was made before the cars were received from the Canadian carrier by Great Northern Railway Company at Sweetgrass, must be included in counting the stops allowed by the original Rule 143 when applying the Great Northern tariff rates from Sweetgrass to the shipments of grain imported from Canada.

STATEMENT OF THE CASE

In 1944 Commodity Credit Corporation, an instrumentality of the United States,[2] was engaged in a special emergency wartime Government relief program to import and distribute certain vital agricultural commodities. In the course of the program Commodity Credit Corporation purchased a large

---

[2] See Title 15, U. S. C. (1946 Ed.), sec. 713.

volume of Canadian grain. The shipments involved in this case were eight carloads of this Canadian grain, which were purchased, transported, and distributed as a part of the program (R. 26). This is a test case which will govern several other pending suits involving the same issue.

The boundary point where all these shipments entered the United States was a point where a line of the Canadian Pacific Railway from interior Alberta connects with a line of the Great Northern Railway running to interior Montana. Canadian Pacific calls this point Coutts (Alberta) whereas Great Northern calls it Sweetgrass (Montana) (R. 50). Coutts and Sweetgrass are the same point, and there the title to the grain passed to Commodity Credit Corporation as purchaser (R. 51).

The typical L & N Car

The history of the shipment in the L & N car is typical of all involved here (R. 52). It was shipped by the Alberta Wheat Pool at Etzikom, Alberta, on April 11, 1944. Canadian Pacific as the carrier issued a bill of lading (R. 50, 70, 71) showing that the shipment was received with freight charges prepaid to Coutts (Sweetgrass), the port of entry, where Canadian Pacific was to deliver the car to Great Northern for the account of and subject to the order of Commodity Credit Corporation. The destination originally named in that bill of lading was Ogden "for Inspection and Diversion" (R. 70).

Before reaching the International Boundary the car was stopped in transit and inspected at Leth-

bridge, Alberta, in order to comply with Section 55 of the Canada Grain Act of 1930 (20–21 Geo. V, ch. 5). (R. 53, 73.)

Upon arrival at Sweetgrass (Coutts), Canadian Pacific delivered possession of the car to Great Northern. At that point the title and control over the shipment were vested under the terms of the purchase contracts in Commodity Credit Corporation. This control was exercised by blanket instructions to Great Northern to reconsign the shipments at Sweetgrass to Spokane (R. 69). Great Northern so received the car and transported it. At Spokane the car was inspected and ordered diverted or reconsigned on a new straight bill of lading to Poultry Producers of Central California, at Petaluma, California (R. 74). The straight bill of lading apparently was not actually issued, but its absence was a bookkeeping detail which would not affect the rates (R. 54). The car moved to Petaluma via Great Northern and connections, being delivered at Petaluma by appellee to Poultry Producers of Central California[3] (R. 54).

The freight charges

Original Basis.—Following arrival of the cars at Petaluma, appellee billed the new consignee for the freight charges from Sweetgrass to Petaluma, calculating them at a rate of 68¢ per cwt., the rate quoted in the Great Northern's tariffs as applicable to shipments of bulk grain in carload lots from Sweetgrass via the actual route to Petaluma, but subject to the provisions of Rule 143 (R. 55–58). The stops in

[3] The events in the movement of L & N car are shown in the way bill which is reproduced in the Record (R. 76).

transit were counted as follows: *first,* an inspection at Spokane (Hillyard); *second,* a reconsignment at Spokane (see R. 78). These did not exceed the free allowance. The charges so calculated were duly paid by Commodity Credit Corporation (R. 56, 57).

Revised Basis.—Later, appellee submitted a supplemental freight bill, in which the rate was restated on a revised basis as the combination of (a) 40¢, the lowest rate from Sweetgrass to Spokane, plus (b) 50¢, the lowest rate from Spokane to Petaluma, making a total of 90¢ from Sweetgrass to Petaluma, with an inspection fee added (R. 56, 79).

This suit is for the unpaid portion of the charges calculated on the revised basis on all eight shipments in the total principal sum of $1,954.14 (R. 4, 59–60).

The revised basis was adopted by appellee as the lowest tariff rate on the hypothesis that the 68¢ rate did not apply. The 68¢ rate from Sweetgrass was rejected on the ground that the shipments' stops in transit exceeded the free allowance prescribed by Rule 143. Appellee supports this view only by counting the stops in transit from the Canadian point of origin so as to include the inspection in Canada required by the Canada Grain Act, *supra* (R. 58).

Appellant considers the original basis of the freight charges correct and counts the stops from Sweetgrass, the point where the shipments first became subject to the Great Northern tariffs (including its Rule 143). Under appellant's view the shipments did not exceed the two free stops in transit allowed by Rule 143 as a

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condition of obtaining the 68¢ rate from Sweetgrass to Petaluma.

The District Court accepted appellee's view and held that the Canadian stop must be included in the count (R. 26–31).

SPECIFICATION OF ERRORS

1. The District Court erred in finding, concluding, and holding that the Great Northern Tariff Rule 143 required that in counting the stops in transit for the purpose of applying a Great Northern rate in the United States having its point of origin at Sweetgrass the inspections and diversions of these shipments must be counted from "the original point of origin in Canada" and must include those made in Canada solely under foreign tariffs before arrival at Sweetgrass. With respect to this grain the record does not disclose what "the original point of origin in Canada" was, or how many inspections, reconsignments, or reshipments it may have received in Canada. The District Court considered only the inspections and diversions or reconsignments from the Canadian point of origin shown on the last bills of lading issued in Canada, which consisted of the inspection made at Lethbridge, Alberta, under Section 55 of the Canada Grain Act, *supra,* and that was error. (R. 38, Finding X; R. 41, Conclusion 1.)

2. The District Court erred in finding, concluding, and holding that the applicable United States rate from Sweetgrass to Petaluma was a combination of (*a*) the rate from Sweetgrass to Spokane, the third point of inspection or diversion after leaving the

Canadian point of origin shown on the Canadian bills of lading (not the third such point after leaving Sweetgrass), plus (*b*) the rate from such third point (Spokane) to Petaluma, totaling 90¢ per cwt. from Sweetgrass, rather than 68¢ per cwt., the flat rate from Sweetgrass to Petaluma. (R. 38 et seq. Finding X, XIV, Conclusions 1, 2.)

3. The District Court erred in finding, concluding, and holding that the difference between the sum collected and the sum due was $1,954.14. (R. 40, Finding XV; R. 42, Conclusion 3.)

4. The District Court erred in not finding, concluding and holding that the shipments were not under the jurisdiction of or subject to the Great Northern tariffs, including its Rule 143, nor moving on any Great Northern tariff rate, until they entered the United States and were received by the Great Northern at Sweetgrass; and that the provision for free stops for inspection and diversion (or reconsignment) in Great Northern Rule 143 did refer, was intended to refer, and could lawfully refer only to the stops made while the shipments were subject to a Great Northern tariff rate, that is to say, to the stops in transit between Sweetgrass and Petaluma; and that the free allowance provided in Rule 143 was not exceeded.

5. The District Court erred in not finding, concluding and holding that the 68¢ rate from Sweetgrass to Petaluma, which would have applied if the shipments had been loaded at Sweetgrass (R. 59), was the highest rate from Sweetgrass lawfully chargeable for these shipments.

6. The District Court erred in not finding, concluding and holding that to charge for the shipments more than would have been charged if they had been actually loaded at Sweetgrass would have constituted an unlawful discrimination against appellant and against Canadian grain, and that in interpreting Rule 143 the Court should presume that the carriers did not so intend and should presume that they intended that the stops in transit should be counted from Sweetgrass.

7. The District Court erred in not finding, concluding and holding that determinative weight should be given to the subsequent formal statement of the Great Northern and other United States carriers in amending Rule 143 so as expressly to permit the free stops to be counted from the point of entry into the United States, in this case Sweetgrass, which amendment was expressly stated by the carriers to be for clarification of the rule (R. 63–65; cf. R. 30).

8. The District Court erred in entering judgment for appellee, and in denying the motion for a new trial, and in not entering judgment for appellant.

SUMMARY OF ARGUMENT

A. Great Northern Rule 143 was only a footnote to Great Northern tariff rates from Sweetgrass, Montana. The Great Northern rates were not joint international rates from Canadian Pacific points. Hence, Rule 143 did not govern the shipments from Canada until they were received by Great Northern from Canadian Pacific at Sweetgrass. This limitation in the scope of Rule 143 appears on the face

of the tariffs, considering Rule 143 together with the rate quotation incorporating it by reference, and together with the title page of the Rules Tariff. In construing Rule 143 all ambiguities and doubts are to be resolved in favor of this view, particularly since Great Northern expressly adopted it by a clarifying amendment, and since appellee's view is unreasonable, discriminatory and unlawful.

B. However, if appellee's view prevails it is only because a fiction of continuity is applied so as to make the reshipments at Sweetgrass "reconsignments." If that fiction penalizes the shipper by increasing the rate instead of accomplishing its purpose of preserving the lowest rate, then the transactions at Sweetgrass should stand as reshipments, so that appellant may pay the lower combination of the rate for a shipment to Sweetgrass plus the 68¢ rate for a reshipment from Sweetgrass.

ARGUMENT

A. The Great Northern's tariffs published the 68¢ rate from Sweetgrass to Petaluma which governed these shipments

1. The charges are computed according to the rates and rules published by the carrier transporting the goods

The tariffs of any carrier can govern a shipment only to the extent that they may have been invoked by a contract of carriage covering the shipment which provides for transportation over the particular carrier's lines subject to its tariffs. When, as here, a bill of lading provides for transportation over the lines of a series of carriers, it is in effect a series of contracts between the shipper and each carrier.

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(R. 70.) All bills of lading recite that the goods are received subject to the current tariffs (R. 70). This serves to incorporate by reference the published tariffs of each named carrier for transportation of the shipment over its lines. Its rules permitting inspection and reconsignment in transit are part of each carrier's tariffs.

> Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. *Kansas City Hay Dealers* v. *Atchison, T. & S. F. Ry. Co.,* 74 I. C. C. 352, 356.

Frequently a carrier's tariffs publish two or more rates for shipments meeting the description on the bill of lading, and when that sort of ambiguity appears the lowest rate or combination of rates applies, by a familiar rule of construction. There can finally be only one applicable rate. *United States* v. *Gulf Refining Co.,* 268 U. S. 542.

Canadian Pacific's contracts herein were contained in its bills of lading, by virtue of which it undertook (*a*) to transport the grain as bailee and common carrier, freight prepaid, to Coutts (Sweetgrass), stopping for an inspection at Lethbridge, Alberta, as required by Section 55 of the Canada Grain Act, *supra,* at the lowest rate provided in its tariffs filed with the Board of Transport Commissioners at Ottawa;[4] and (*b*) at Coutts (Sweetgrass) to deliver the loaded cars to Great Northern as bailee for appellant.

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[4] See Canadian Railway Act of 1919, Rev. Stat. ch. 170, sec. 323, and Transport Act of 1938, 2 Geo. VI, chap. 53, sec. 3, 35.

The effect of the Lethbridge inspection must be taken into consideration in applying the Canadian Pacific tariffs to Sweetgrass, since Lethbridge was a stop on the Canadian Pacific Railway. (R. 51, 53, 70, 73.)

Great Northern's contracts were contained in the original bills of lading (issued by Canadian Pacific as agent) as modified or modifiable by virtue of (*a*) appellant's blanket instructions (R. 69) as Great Northern received the loaded cars at Sweetgrass, and by virtue of (*b*) appellant's second diversion orders at Spokane (R. 54, 74).[5] Great Northern undertook to receive the grain in loaded cars at Sweetgrass as bailee for appellant, to transport it via Spokane to the point of interchange with the next carrier[6] en route to Petaluma, and at such interchange point to deliver it to the next carrier for the account of the final consignee. Great Northern undertook to perform this service, and to permit the inspection at Hillyard (Spokane) and the reconsignment at Spokane, at the lowest rates which were published in its tariffs filed with the Interstate Commerce Commission at Washington (49 U. S. C. sec. 6) as applicable to such shipments moving over its lines from Sweetgrass (via Spokane) to its point of interchange with the next carrier en route to Petaluma.

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[5] It is stipulated that appellant was entitled to a new bill of lading on the second diversion, and that its absence would not affect the rates (R. 54, 74). Appellant was likewise entitled to a new bill of lading at Sweetgrass, and its absence would not affect the rates.

[6] The next carrier was Southern Pacific Company (R. 71, 74).

2. The authority of Rule 143 was coextensive with the 68¢ rate

The 68¢ rate, which appellant believes to be the applicable rate, was published by Great Northern Railway Company (through an agent) in Pacific Freight Tariff Bureau Tariff No. 241–B. (R. 55). This tariff named the 68¢ rate as applicable to shipments originating on the Great Northern Railway at Sweetgrass or received there from Canadian points (R. 55). The number of free inspections or reconsignments allowable under this rate from Sweetgrass was limited by Rule 143 of the Great Northern Rules Tariff, which was incorporated into the 68¢ rate quotation in Tariff No. 241–B. by reference. Only thus was Rule 143 invoked and brought into the situation.

The Rules Tariff could be applied only to movements made under tariff rate quotations expressly incorporating the Rules Tariff by reference. As the Interstate Commerce Commission said about another reconsignment tariff—

> The rules in the reconsignment tariff have application only when, as here, the tariff naming the line-haul rates makes reference thereto. *Jacob & Co.* v. *Michigan Central R. Co.,* 210 I. C. C. 433, 434. See also *Washington Broom & Woodenware Co.* v. *Chicago, R. I. & P. Ry. Co.,* 15 I. C. C. 221.

The Great Northern Rules Tariff was not incorporated or referred to in the separate Canadian Pacific rate tariffs. It was invoked only to govern the terms of the transportation on Great Northern lines from Sweetgrass. The scope of the rule is coextensive with the scope of the rate which it modifies, and Rule

143 is only a footnote to Great Northern rate quotations.

Although appellee concedes that if the shipments had originated at Sweetgrass the stops in transit would be counted from Sweetgrass, it insists that because these particular shipments were initiated in Canada, the stops must be counted from the Canadian Pacific point of origin, so as to include any known stop made in Alberta even though made before the shipments ever acquired any relation to the Great Northern tariffs whatsoever. This is forcibly to make Rule 143 a Canadian Pacific tariff rule.

Appellee's theory produces absurdity. The record does not show where this grain originally came from; it only shows that it was shipped to the United States from a point in Alberta on a Canadian Pacific bill of lading to the order of Commodity Credit Corporation. This may quite possibly have been a reconsignment or reshipment; if so, then Lethbridge, Alberta, where the grain was inspected, would be the *second* stop, and Sweetgrass the *third,* and under appellee's view the applicable rate would then be a combination of the Canadian rate of 15½¢ to Sweetgrass plus the Great Northern rate of 68¢ from Sweetgrass to Petaluma. But, that is the rate for which appellant is now contending. Does appellee deny it because there were at once too many stops and also too few?

Pursuing absurdity further, if the inspection at Lethbridge had been the *third* inspection or reconsignment, then under appellee's view Great Northern's

Rule 143 would deny the through rate from the Canadian point of origin on the Canadian Pacific line to Sweetgrass, regardless of whatever the Canadian Pacific tariffs might provide.

3. The scope of Rule 143 is limited on the face of the Rules Tariff

Another clue to the limited scope of Rule 143 clearly appears on the tariff itself. In construing a tariff (like any ordinary contract or statute) the entire instrument must be visualized. Rule 143 was merely one part of a whole system of regulation published in the Great Northern Rules Tariff. In order to ascertain its scope, it is necessary, as shown, to examine the rate tariff provision which invoked it by reference as a condition of the particular rate. The title page of the Rules Tariff itself should also be examined. It reads as follows:

> GREAT NORTHERN RAILWAY COMPANY
>
> In Connection With
>
> FARMER'S GRAIN AND SHIPPING COMPANY
> THE MIDLAND RAILWAY COMPANY OF MANITOBA
>
> ---
>
> LOCAL AND JOINT FREIGHT TARIFF
>
> Providing
>
> RULES AND CHARGES
>
> Governing
>
> The Diversion or Reconsignment of Freight and Holding of Cars for Surrender of Bills of Lading or Written Orders, or Inspection *at points on the above-named lines.* (R. 67.) [Italics added.]

Rule 143 is merely a subheading under that title. Nothing could be clearer than that Rule 143, when invoked by the Great Northern tariff quotation of the 68¢ rate from Sweetgrass, refers to diversions and reconsignments "at points on the above-named lines," and not on the Canadian Pacific.

For Great Northern to vary the number of free stops allowed on its lines after leaving Sweetgrass because of what happened under another jurisdiction while the grain was moving under a separate rate contract with Canadian Pacific, under terms published by separate tariffs filed in Ottawa, is as preposterous as if a court in a jury trial should grant both parties ten peremptory challenges and then allow the defendant only six because he had used four in another proceeding against another party in another court in another State.

Appellee and Great Northern could have combined with Canadian Pacific to publish a through joint international rate from Alberta to Petaluma, invoking by reference Rule 143 for coextensive application. But they did not so combine. Great Northern and appellee simply contracted to transport grain from Sweetgrass to Petaluma at 68¢ under certain express conditions. Appellant merely seeks to hold them to those conditions.

4. Ambiguities and doubts must be resolved in favor of appellant

The purpose of Rule 143 was to cut down on the stops in transit for inspection and reconsignments by requiring the third stop to be treated as a reshipment, as a means of inducing shippers to unload scarce cars and make them available for another

loading sooner (R. 62). The purpose and concern of the Great Northern managers, when adopting Rule 143 (or when making any other tariff amendment) extended only to the limits of their lines, which were the realm of their operations and traffic movements. Their concern did not extend to Canadian Pacific lines in Canada. Any governmental agency in the United States participating in the promulgation of the Rule, such as the Interstate Commerce Commission, would have contemplated a rule applicable to railroads in the United States only. 49 U. S. C. sec. 1. The Dominion of Canada and the great Canadian railroad systems had their own car problems and solutions and their own system of railroad tariff regulations.[7]

Appellee showed that Rule 143 was ambiguous by billing the consignee successively two different ways (R. 78–80). The court must resolve ambiguities and doubts in favor of the shipper. These are "fine-type" contractual provisions and awkwardly worded and published by the carriers themselves. Where two alternatives are provided the shipper is entitled to the alternative most favorable to him, and when a provision is capable of two meanings he is entitled to have applied the meaning most favorable to him. These are familiar principles of railroad tariff regulation and interpretation. *Southern Pacific Co.* v. *Lothrop,* (C. A. 9) 15 F. (2d) 486, cert. denied 273 U. S. 742; *Great Northern Ry. Co., et al.* v. *Commodity Credit Corporation,* 77 Fed. Supp. 780; *Pillsbury Flour Mills* v. *Great Northern R. Co.,* 25 F. (2d) 66 (citing earlier cases).

[7] See note 4, supra.

5. Appellant is only urging the interpretation formally adopted by Great Northern in its amendment of Rule 143 expressly for clarification, which should be determinative

Rule 143 originally gave the shipper two free inspections and reconsignments and required that the third be treated as a reshipment. The shipper had the option to count the inspections and reconsignments from either (*a*) the last point of loading or (*b*) "the point at which it becomes subject to combination of rates as provided in this rule." As Commodity Credit Corporation executed its historic emergency grain import program, controversy developed over the very point now at issue. After the time of the shipments in this proceeding, the United States carriers, including Great Northern, attempted to settle the controversy by adopting appellant's view. This was specially published in a formal amendment which specifically added (*c*) "or the point where the car comes in possession of carriers within the United States." This they expressly declared to be "for clarification purposes." Appellant's view, then, represented the intent of Great Northern all along, and the Court should adopt it.

> Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law. *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468.

6. Appellant's lawful interpretation should be favored over plaintiff's unlawful interpretation

Railroad tariffs in the United States, when filed with the Interstate Commerce Commission, become a

part of the Federal system of legislative rate regulation and have the force of law. 49 U. S. C. sec. 6 (1), 6 (7).

> It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases. *Bull S. S. Lines, Inc.* v. *Thompson,* (C. A. 5), 123 F. (2d) 943, 944; citing *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, and *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94. See *Pillsbury Flour Mills* v. *Great Northern R. Co., supra.*

Hence the Court by a familiar rule of statutory construction should favor a lawful interpretation over an unlawful one and should presume that Great Northern, *et al.,* did not intend an illegality. Under appellee's view Rule 143 would be illegal. It would violate several provisions of the Interstate Commerce Act, 49 U. S. C. sec. 1–4, including the following:

> *Section 1 (4)*, requiring United States railroad carriers to provide just and reasonable rates.
>
> *Section 1 (5)*, prohibiting every unjust and unreasonable charge for the transportation of goods.
>
> *Section 1 (6)*, requiring just and reasonable regulations and practices affecting the handling and transporting of goods and prohibiting every unjust and unreasonable regulation and practice.

Section 2, prohibiting discrimination by carriers' charging more for one shipment than for another for a "like and contemporaneous service" in "transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3 (1), prohibiting an undue preference (with corresponding prejudice) to any person, locality, or traffic.

Section 4 (1), prohibiting the charging of a through rate that exceeds the aggregate of intermediate rates, without specific approval of the Interstate Commerce Commission following investigation.

Appellee's interpretation would make Rule 143 as applied to these shipments unjust, unreasonable, discriminatory, prejudicial, and unlawful. It is impossible for plaintiff to show any consideration which would validate under the Interstate Commerce Act a railroad rate from Sweetgrass 32 percent greater for Alberta grain than for Montana grain. Great Northern would perform no greater service for the import grain than for domestic grain. Very likely it would perform less, receiving Alberta traffic from Canadian Pacific at Sweetgrass by the trainload, and having its crews simply make a routine train inspection, attach its locomotive and caboose, and move the train on southward. For Montana grain Great Northern would have to provide an empty car in proper condition, place it on the shipper's siding for loading, inspect the loading, and pick up and assemble the car into an outbound train. After leaving Sweetgrass imported and domestic carloads would be treated

identically. Denial of the 68¢ rate would be a gross discrimination against Canadian grain.

To implement the "aggregate of intermediates clause" (Section 4 (1), *supra*) the Commission has published a declarative statement in its Tariff Circular 20, which shows its opinion as to the reasonableness (and hence lawfulness) of charging more for a long-haul than for the sum of intermediate hauls in the same route, as follows:

> 56. *Reduction of Rate to Equal the Aggregate of the Intermediate Rates.*—(a) Section 4 of the Act, as amended, prohibits the charging of any greater compensation as a through rate than the aggregate of the intermediate rates that are subject to the act. The Commission has frequently held that through rates which are in excess of the sum of the intermediate rates between the same points via the same route are prima facie unreasonable. * * * It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider a rate which is higher than the aggregate of the intermediate rates between the same points via the same route as prima facie unreasonable and that the burden of proof would be upon the carrier to defend such unreasonable rate.
>
> (b) Where a rate is in effect by a given route from point of origin to destination which is higher than the aggregate of intermediate rates from and to the same points, by the same or another route, such higher rate may, on not less than one day's notice to the public and the Com-

> mission, be reduced to the actual aggregate of such intermediate rates. * * *.

The aggregate of intermediate rates from Alberta to Petaluma is 83½¢ (15½¢ plus 68¢). To charge $1.055 (15½¢ plus 40¢ plus 50¢) is therefore unjust, unreasonable, and unlawful.

B. If the reconsignments at Sweetgrass necessitate counting the Canadian stop in applying Rule 143, then appellee is entitled to have the transactions at Sweetgrass treated as reshipments so as to obtain a combination of the rate to Sweetgrass and the 68¢ rate from Sweetgrass

It is agreed that if the shipments had been loaded at Sweetgrass the 68¢ rate to Petaluma would have applied (R. 59). Hence, if the shipments had come in from Canada to Sweetgrass, and had been there wastefully unloaded and reloaded, the 68¢ rate would have applied, since Sweetgrass would then have been the last point of loading. Furthermore, if, when the shipments came into Sweetgrass, Commodity Credit Corporation had exercised its option of making Sweetgrass a destination point and had then reshipped out of Sweetgrass on a new bill of lading, then Sweetgrass would have been the Great Northern's *bill of lading* point of origin as well as its *rate* point of origin, so that appellee would have counted the inspections and reconsignments from Sweetgrass, and the 68¢ rate to Petaluma would obviously have been applied. Appellee is now trying to penalize appellant for not having exercised its right of breaking the course of the shipment more drastically at Sweetgrass. Instead of a new shipment or "reshipment" at Sweetgrass there was a "reconsignment," and appellee would

apply this special "rate benefit" so as to bar the 68¢ rate. But if it barred the low rate, then reconsignment was no benefit, and should be disregarded.

Reconsignment historically came into practice as a "transit privilege" extended through special tariff rules to shippers solely for their financial benefit and in order to enable them to change the destination point yet still preserve the *benefit* of any through rate from the original point of origin to final destination. It is an optional concept of fictitious continuity applied in order to avoid the application of a higher combination of the rates to and from the point of the reshipment or reconsignment.

> Reconsignment, as technically understood, is a *privilege* extended by carriers to shippers under which goods may be forwarded to a point other than their original destination, without removal from the car and *at the through rate from the initial point to that of final delivery.* This application to the shipment of the through rate—which is often less than the sum of the intermediate rates in and out of the point of original destination—is the distinctive feature of reconsignment, and separates it from reshipment, which is otherwise quite similar. *Any consignee has a right to reship goods received by him, without removal from the car, upon payment of the freight charges to that point, the goods going forward under a new transportation contract.* This is an incident to the transportation facilities offered, while reconsignment is a privilege that exists only under

> the permission granted in the tariff and that must be exercised only under the rules and conditions there laid down. When the through rate is equal to the sum of the intermediates in and out, reconsignment and reshipment differ only as to the rules applicable to them, particularly the rules found in the demurrage codes of the carriers. *Detroit Traffic Assoc.* v. *Lake Shore & M. S. R. Co.,* 21 I. C. C. 257, 258. [Italics added.]

Reconsignment is only an artificial concept of continuity which the railroads by special rule consent to adopt for the shipper's benefit. It is the railroad agreeing to ignore a reshipment. When appellant gave orders to "divert to Spokane" (R. 69), then, if the artificial reconsignment concept operates so as to penalize rather than to benefit, then appellant would let the reshipments at Sweetgrass stand for what they were—reshipments. The 68¢ rate then applies.

This would be a freakish situation, where a reconsignment privilege, by increasing the rate, would do just the opposite of what it was intended to do. Such frustration of intent could occur only under the appellee's method of applying Rule 143, which further discredits that method. Properly applied, Rule 143 produces no such paradox.

CONCLUSION

For the reasons above stated and discussed appellant prays the Court to reverse the District Court and to order judgment for appellant.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of this brief on counsel for the appellee by mailing.

ARMISTEAD B. ROOD,
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U. S. GOVERNMENT PRINTING OFFICE: 1950

No. 12,427

IN THE

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a Corporation,
Appellee.

BRIEF FOR APPELLEE

On Appeal from the Judgment of the District Court of the United States for the Northern District of California, Southern Division

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SUBJECT INDEX

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APPELLEE'S POSITION

(a) Summary of Facts.

It is believed that the facts involved in this litigation are undisputed and that the only question to be determined is with respect to the manner in which a tariff provision of the Great Northern Railway should be interpreted and applied to those facts.

Each of the cars involved had their origin at a point in Canada (R. 36, 50). The last point of loading each car was in Canada at the point of origin (R. 30). The bills of lading issued at each of the points of origin in Canada by the Canadian Pacific Railway showed that the shipments were consigned to the order of the Commodity Credit Corporation at Ogden, Utah (R. 39, 50). It is, therefore, established that each of the shipments was billed originally as a through shipment from a point in Canada to a point in the United States.

An inspection was made of each shipment after it left its point of origin and last point of loading, which inspection was made while the cars were in possession of the Canadian Pacific Railway in Canada (R. 28, 38, 53).

Pursuant to instructions from Commodity Credit Corporation, each of the shipments was diverted from its original destination at Ogden, Utah, to Spokane, Washington. These diversions were accomplished at Sweetgrass, Montana, and in compliance therewith the cars were transported to Spokane, Washington (R. 51, 52).

Each of the shipments was inspected at Spokane, Washington, in accordance with request made by Commodity Credit Corporation (R. 52) and subsequently at the same point the Commodity Credit Corporation ordered the shipments reconsigned to Poultry Producers of Central California at Petaluma, California (R. 52). The diversion orders were accomplished at Spokane, Washington, and each of the cars was transported and ultimately delivered to the billed consignee at Petaluma (R. 52).

The tariff rule which is involved and which must be applied to the foregoing facts is contained in Great North-

ern Railway Company Rules Tariff No. 1240-0, I.C.C. No. A-8071 (Item No. 143), which was in effect at the time each of the shipments was transported (R. 37, 50, 66, 67).

That rule provides that not more than two inspections or one inspection in addition to a diversion without inspection en route will be permitted and that if, after a car has received two inspections or diversions en route authorized in the rule, it is subsequently inspected or diverted it will be subject to a combination of tariff rates applicable on a shipment terminating, and on a shipment originating, at the point at which such subsequent inspection or diversion is performed in effect on date of shipment from point of origin. The reconsigning tariff rule also provides that the number of stops for inspection or diversion shall be reckoned—

1. from the last point of loading car, or
2. from the point at which it becomes subject to combination of rates as provided in this rule.

(b) Summary of Appellee's Argument.

Since the shipments were in the possession of the Great Northern Railway at Spokane, Washington, at the time diversion orders were presented to that carrier by Commodity Credit Corporation, whereby destination of the shipments was changed from Spokane, Washington, to Petaluma, California, there can be no question but that the provision of the Great Northern Railway Rules Tariff referred to herein is applicable to these shipments and must be given consideration. This fact is conceded throughout appellant's brief. The sole question involved is with respect to the manner in which the provision should be

interpreted and with respect to the extent of its applicability.

The tariff rule provided that if, after a shipment had two inspections or one inspection in addition to a diversion without inspection en route, a third inspection or diversion is requested, a combination of rates should be assessed over the third inspection or diversion point It also specifically stated that such inspections or diversions should be counted from the last point of loading or the point at which the shipment became subject to combination of rates, as provided in the tariff rule.

It is the position of appellee that compliance with the plain and unambiguous language of the tariff rule is mandatory under well settled principles of law. As was said in *Pennsylvania Railroad Co. v. International Coal Mining Co.* (1913), 230 U.S. 184, 197, 57 L.Ed. 1446, and quoted with approval in *Davis v. Portland Seed Co.* (1924), 264 U.S. 403, 418, 68 L.Ed. 762:

> "* * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The shipments involved had not become subject to a combination of rates, as provided in the tariff rule, up to the time the diversion was requested at Spokane, and it was therefore necessary under the clear and unequivocal language of the tariff rule to count all inspections or

diversions from the last point of loading (the Canadian point of origin) to ascertain whether the Spokane diversion was the third one which would make necessary the assessment of a combination of rates over that point.

When this is done, it is clear that the inspection and diversion at Spokane, Washington constituted the third such order and made it necessary to apply a combination of rates over that point, as provided in the tariff rule under consideration.

It is immaterial that it was necessary to consider an event that took place in Canada in order to comply with the condition imposed by the tariff rule. The carrier could place any condition it desired in its tariff and that condition is binding upon both a shipper and a carrier. The carrier, for example, could have provided that any car which had been loaded at a certain specified point in Canada would be subject to a combination of rates at Spokane if a diversion was requested at the latter point.

The hypothetical tariff rule, as well as the tariff rule under consideration, might be unreasonable and prejudicial but, if the rule is contained in an applicable tariff, it is binding to the same extent as a statute upon a shipper and a carrier. It is true, of course, that the Interstate Commerce Commission in a proper proceeding before it might strike down the rule because it was unreasonable, but that body alone has power to take such action. The Court cannot do so. *Pennsylvania Railroad Co. v. International Coal Mining Co.* (1913), 230 U.S. 184, 57 L.Ed. 1446.

Appellee's position and the decision of the trial court, reported at 83 Fed. Supp. 639, are supported by informal

decision of the Interstate Commerce Commission which is set forth in Appendix A hereto.[1] It will be noted that the identical fact situation was involved in the Commission proceeding and that the opinion was expressed that all inspections or diversions from the Canadian point of origin, whether they occurred in Canada or in the United States, must be counted in applying the reconsigning tariff rule.

In this connection, the Court said in *Updike Grain Corporation v. St. Louis & S. F. Ry. Co.* (C.C.A. 8, 1931), 52 F.(2d) 94, at page 96:

> "While the decisions of the Interstate Commerce Commission are not conclusive here, they are of great weight. They are especially persuasive in this highly technical field of rate construction and rate interpretation."

In *Boston & Maine Railroad v. Hooker* (1914), 233 U.S. 97, the Interstate Commerce Commission had required an amendment to a tariff schedule. In commenting upon this fact, the Supreme Court said at page 118:

> "This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act."

Appellee's position and reasons therefor will be more fully developed and indicated in connection with its comments upon the arguments presented by appellant.

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[1]The decision is not reported but was rendered in response to informal complaint filed by Colorado Mill & Elevator Co. pursuant to provisions of Rule 25 of the General Rules of Practice of the Interstate Commerce Commission.

SPECIFICATIONS OF, AND COMMENTS UPON, APPELLANT'S POSITION

(a) Appellant's Statement as to Application of a Particular Carrier's Tariff.

It is difficult to understand the point which appellant is attempting to make in connection with the opening statement of its argument set forth in paragraph numbered 1 on page 11 under the heading "The Charges Are Computed According to the Rates and Rules Published by the Carrier Transporting the Goods."

In so far as the various contracts referred to by appellant in this section are concerned, the important fact to bear in mind is that the shipments moved from various points in Canada, originally destined to Ogden, Utah, as through shipments. The various contracts of carriage were subsequently modified to the extent that the original destination of the shipments was changed to Spokane, Washington, and later to Petaluma, California.

We agree wholeheartedly with the well settled principle set forth on page 12 of appellant's brief, reading:

> "Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effective. *Kansas City Hay Dealers v. Atchison, T. & S. F. Ry. Co.*, 74 I.C.C. 352, 356."

Application of this principle to the facts of this case resolves the entire controversy. The Great Northern Rules Tariff sets the terms under which the diversion privilege is granted, and if a shipper avails himself of the privilege, he is bound by those terms. When the number of stops for inspections or diversions is computed, as provided in that rule, it is necessary to assess a combination of rates at Spokane as was done by appellee.

(b) The Argument That Rule 143 Is Applicable Only to Events While Cars in Possession of Great Northern Railway.

In its argument in points 2 and 3 commencing at page 14 and continuing to the bottom of page 17 in appellant's opening brief it is contended that rates covering transportation in the United States cannot be determined by events which took place in a foreign country, such as Canada. The reasoning appears to be that in order to apply a rule of the reconsigning tariff it must be first connected with the tariff containing the rate charged for transportation of a shipment; and since the tariff containing the rate for the Canadian portion of the movement is not on file with the Interstate Commerce Commission, neither the Canadian rate factor nor any acts in Canada can be considered in determining charges for movement in the United States.

The reasoning is not entirely correct because there must also be borne in mind the tariff interpretation rule quoted at page 12 of appellant's brief, as follows:

> "Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. *Kansas City Hay Dealers v. Atchison, T. & S. F. Ry. Co.,* 74 I.C.C. 352, 356."

Furthermore, appellant overlooks the fact that application of the Great Northern Rules Tariff has no effect upon the rate assessed for the movement in Canada, and that reference is made to an event that occurred in Canada only to comply with the explicit language of the Rules Tariff.

It is agreed that the rules in the reconsignment tariff have application only when the tariff naming the line haul rates makes reference thereto and also that diversions and reconsignments are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. Both of these factors are present in the instant case and justify the fact conceded by all concerned that the Great Northern Railway Rules Tariff under consideration is applicable to the instant shipments.

It is submitted that we are not here concerned with the rate charged for movement of the shipments in Canada, nor are we here concerned with any tariffs of Canadian railroads which are not on file with the Interstate Commerce Commission. We are here concerned only with an *event* that took place in Canada, i.e., the inspection of the cars in Canada after they had departed from their point of origin and last loading point; and we must do so in order to comply with the plain language of the tariff rule.

In this part of its brief appellant also makes reference to hypothetical facts and assumptions which it contends result in absurd conclusions as a result of following appellee's theory and the decision of the trial court. It is submitted that no good purpose will be served in attempting to answer such arguments, as this will only result in digressions which will have no bearing on the issue involved, and unduly prolong this brief. We are here concerned with a specific factual situation, which alone should be given consideration in determining the application of the tariff rule involved.

Appellant also indicates some doubt with respect to the point of origin of the shipments, subject of this litigation.

Such a statement comes as a surprise in view of the stipulated facts upon which the trial was conducted, the statements made by the trial court in reaching a decision and the specific findings of fact made by the trial court. It is submitted that no fact is more clearly established by the record in this case than the fact that the last point of loading and the point of origin of each of the shipments was at the point of shipment named in the bills of lading executed by the Canadian Pacific Railway (R. 30, 36, 50).

(c) Contention That Ambiguities and Doubts Must Be Resolved in Favor of Appellant.

In point 4 of its argument commencing at the bottom of page 17 of its brief appellant refers to the well settled rule of law to the effect that any ambiguities and doubts in a tariff must be resolved in favor of a shipper. No effort is made, however, to point out any ambiguity in the tariff rule under consideration. It is stated that freight bills were presented in two different ways, but it is difficult to follow appellant's reasoning that because this was done there was ambiguity in the tariff provision. It is not unusual for a railroad agent to prepare freight bills on a basis which he feels to be correct but which must be revised later to conform to the facts of a particular case.

In *Atlantic Coast Line R. Co. v. Atlantic Bridge Co., Inc.,* (C.C.A. 5, 1932) 57 F.(2d) 654, the court said at page 656:

> "The intention thus manifested in the words of the tariff is alone the intention to which the law gives effect. Beaumont, Sour Lake R.R. vs. Magnolia Provision Co., (C.C.A.) 26 F.(2d) 72."

See also *Pillsbury Flour Mills Company v. Great Northern Railway* (C.C.A. 8, 1928), 25 F.(2d) 66, where the court said at page 69:

> "Another cardinal rule in the construction of statutes is that effect is to be given, if possible, to every word, clause, and sentence. 36 Cyc. 1128; United States v. Ninety-Nine Diamonds, 139 F. 961, 2 L.R.A. (N.S.) 185 (C.C.A. 8); United States ex rel. Harris v. Daniels (C.C.A.) 279 F. 844; Hellmich v. Hellman, 18 F.(2d) 239 (C.C.A. 8)."

Attention is called to *Southern Pacific Company v. Southern Rice Sales Company* (Texas, 1943), 174 S.W.2d 1018, where the court said at page 1020:

> "* * * It is only after one knows the purpose for which the 26 cent rate was created that it becomes possible to read into the words of the tariff the meaning which appellee contends they have, and which appellant and the other steamship companies conceived that they have. *We cannot give effect to that purpose by amending, through construction, the tariff so as to make the tariff conform to the purpose of its framers, but which they failed to express. That would be to corrupt the meaning of the language used, not to construe it, to make it square with what was intended but not expressed.*" (Emphasis added)

In *Southern Pacific Co. v. Lothrop* (C.C.A. 9, 1926), 15 F.(2d) 486, the court said at page 487:

> "* * * Astute ingenuity might succeed in reading ambiguity into the language, but the ordinary, intelligent shipper would find none."

The foregoing statement is particularly applicable to the instant case, although the language of the tariff rule is

so clear and explicit that it is difficult to see how it can be argued that there is any ambiguity.

(d) Appellant's Argument with Respect to Subsequent Amendment of the Tariff Rule.

At the top of page 19 of appellant's brief it is stated:

> "Rule 143 originally gave the shipper two free inspections and reconsignments and required that the third be treated as a reshipment. The shipper had the option to count the inspections and reconsignments from either (a) the last point of loading, or (b) 'the point at which it becomes subject to combination of rates, as provided in this rule'."

Here in bold print the appellant states exactly what the Great Northern Railway Rules Tariff provides in plain and unambiguous language. It is gratifying to note, particularly, that appellant admits that under the applicable tariff a shipper had the option to count the inspections and reconsignments from either (a) the last point of loading, or (b) the point at which it becomes subject to combination of rates, as provided in this rule.

Appellant continues by saying that the tariff rule was amended by adding (c) "or the point where the car comes in possession of carriers within the United States." Even though it is a fact, as stated by appellant, that the amendment was designated "for clarification purposes" a reading of the entire amended rule indicates quite clearly that all that was done by the carriers was to add a third option to the two which had always been in effect.

It is submitted that amendment of the tariff rule has no effect upon the application or interpretation of the rule as it read at the time the involved shipments moved.

The plain language of the tariff rule with which we are concerned cannot be said to have a different meaning than that clearly indicated by its provisions merely because the amended rule contains an additional option.

It is submitted that the plain language of the tariff rule that the number of inspections or diversions shall be computed from the last point of loading or from the place where a shipment becomes subject to a combination of rates as provided in the rule, cannot be interpreted or in any way tortured to mean that the number of inspections should be computed from the border point merely because a subsequent tariff rule provides an *option* to do so. Such reasoning would flaunt all rules of logic and read into the original tariff rule a phrase which was not present at the time the involved shipments were transported. A complete answer to this contention of appellant is found in the case of *Louisville & Nashville Railroad Co. v. Speed-Parker, Inc.* (Fla., 1931) 137 So. 724, at page 728:

> "The controlling question involved in these cases depends upon the proper construction of the applicable tariffs and the Florida Railroad Commission's classification as they existed when the shipments in question moved. *The subsequent amendment by the defendant of the rate schedule, after the controversy had arisen, even though approved by the Railroad Commission, could not change the meaning or legal effect of the applicable rate schedule and classification in force when the cause of action, if any, arose.* As was said by the Circuit Court of Appeals for the Ninth Circuit, in Spokane, P. & S. Ry. Co. v. Lothrop, (*Southern Pacific Co. v. Lothrop*) 15 F.(2d) 486, 487: 'To avoid the peril involved in the possibility that the courts would take the view here con-

tended for by the defendant in error, they had the right to abrogate the clause, without impliedly admitting the validity of such a contention.' See, also Seaboard A. L. Ry. Co. v. Parks, 89 Fla. 105, 104 So. 587.

"Furthermore, the statutes make it the duty of the carrier to collect the lawfully published and established rate, notwithstanding its consent or agreement not to do so, or the fact that it may have, in the absence of such statutes conducted itself in such a manner as to estop itself from the collection of the correct rate. Pittsburgh, C. C. & St. L. Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L.Ed. 1151. *Therefore, the amendment by the defendant to its tariff with the approval of the Railroad Commission, made after this controversy had arisen, was, in our opinion, immaterial and irrelevant, and should not have been admitted in evidence.*" (Emphasis added)

It will be noted that the above decision cites and quotes with approval from the case of *Southern Pacific Co. v. Lothrop* (C.C.A. 9, 1926) 15 F.(2d) 486, decided by this honorable court. In that case the carrier had eliminated a part of the applicable tariff provision subsequent to movement of the involved shipments, to which fact the court attached no significance in connection with its interpretation of the tariff as it existed at the time of movement of the involved shipments.

(e) Argument That Appellant's Lawful Interpretation Should Be Favored Over Plaintiff's (Appellee's) Unlawful Interpretation —an Attempt to Raise a Question as to Reasonableness of the Tariff Provision.

Appellant opens its argument with respect to the above subdivision with the following quotation at page 20 of its brief:

> "It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases. *Bull. S. S. Lines, Inc. v. Thompson,* (C.A. 5), 123 F. (2d) 943, 944; citing *Pennsylvania R. Co. v. International Coal Co.,* 230 U.S. 184, and *Louisville & N. R. Co. v. Maxwell,* 237 U.S. 94. See *Pillsbury Flour Mills v. Great Northern R. Co., supra.*"

Appellee does not question this well settled principle of law, but on the contrary urges its application in the determination of this controversy and particularly calls attention to that part of the quotation that a tariff rule "must be strictly applied regardless of hardships that may arise from its application in particular cases."

The main argument here presented by appellant is directed to the reasonableness of the tariff provision and an attempt is made to show that the interpretation and conclusion reached by the trial court is unjust, unreasonable, discriminatory, prejudicial and unlawful.

The identical proposition was considered by this honorable court in the case of *Reconstruction Finance Corporation v. Spokane, P. & S. Ry. Company* (C.C.A. 9, 1948), 170 F.(2d) 96. In that case there was a controversy as to

which of two rates should be applied to the involved shipment. The shipper presented a traffic expert who testified that in his opinion the item providing for the lower (in bond) rate was the applicable one. It appears that thereafter an effort was made to introduce certain tariff schedules as exhibits in support of the witness's testimony. It was said at page 97:

> "The court understood the exhibits were being offered as 'substantive' evidence and declined to receive them as such, but stated: 'He [the witness] can say that the reason he bases his opinion (that all shipments, tax unpaid, come under the lower rate) is because he has examined the tariffs of other lines and that they did adopt that procedure.' Whereupon, the witness made a rather lengthy non-responsive statement ending as follows: 'Therefore, it seems to me, it necessarily follows logically that they [the shippers] should not be called upon to pay 60 cents a gallon, a rate based on carrier's responsibility of 60 cents a gallon plus the tax.' Thus the witness, instead of proceeding along the line of the court's suggestion, rationalized the applicable facts which he thought a proper basis for the application of a certain rate, into the conclusion that such rate therefore was the legal one. This was fair argument to the rate maker, but the district court is not the rate maker."

Following the above statement, reference was made to a footnote which appears below:

> "'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a compari-

son of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.' Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 185, 196, 33 S.Ct. 893, 895, 57 L.Ed. 1446, Ann. Cas. 1915A, 315."

The argument which is being made by the appellant in the instant case might well be directed to the Interstate Commerce Commission which, as this court well knows, based upon the foregoing authority, is the only body which can determine whether a rate or tariff provision is reasonable or discriminatory. It is well settled of course that this court can give no consideration to such matters and is bound to interpret the tariff provision in accordance with its plain and unambiguous language.

In the case of *Davis v. Portland Seed Co.* (1924), 264 U.S. 403, 68 L.Ed. 762, the carrier had published a rate which admittedly violated the so-called long and short haul clause of the Interstate Commerce Act. Violation of the latter provision subjected the carrier to possible penalty and the plaintiff contended in its action to recover overcharges paid to the carrier that that fact made the rate charged on the shipments unlawful so that the only

applicable rate was the lower one in effect from a more distant point via the same route. The Court said at page 424:

> "The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission and, *prima facie* at least, incurred the penalties of § 10. * * * But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either."

In giving judgment for the carrier, the court said at page 425:

> "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in United States v. Louisville & N. R. Co., 235 U.S. 314, 322, 323, 59 L.ed. 245, 251, 252, 35 Sup. Ct. Rep. 113; but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded."

See also, *Mobile & O. R. Co. v. Southern Sawmill Co.* (Mo., 1923), 251 S.W. 434, where the court said at page 436:

> "We begin with the thoroughly settled rule that the legal rate is the *filed* rate, and it is the duty of the

carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the Interstate Commerce Commission. And this is so even though such rate be excessive, unreasonable and unlawful. (Citing Pittsburgh v. Fink, 250 U.S. 577; L. & N. Railroad Co. v. Maxwell, 237 U.S. 94; Dayton Coal Co. v. C. N. & T. P. Railroad Co., 239 U.S. 446; Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U.S. 185; Armour Packing Co. v. U.S., 209 U.S. 56, and many others)."

Bearing in mind the fundamental fact that both appellant and appellee agree that the provisions of the Great Northern Railway Rules Tariff under consideration are applicable to the involved shipments, it is submitted that the foregoing authorities require this court to follow the unequivocal language of that tariff and affirm the decision of the trial court.

(f) Appellant's Contention That Diversion Accomplished at Sweetgrass Should Be Treated as a Reshipment.

The final argument presented by the appellant commencing at the top of page 23 of its brief is certainly unique and novel. It necessarily concedes, for the purpose of making this argument at least, that the Canadian inspection should be counted under the provisions of the Great Northern Railway Rules Tariff. It seeks to avoid the result which must flow from application of the tariff in this manner, however, by stating that the reconsignment at Sweetgrass should be treated as a reshipment.

It should be remembered that reconsignment is a privilege which a carrier may or may not grant and that the carrier may prescribe any restrictions it feels proper. If

a reconsignment is permitted within the limitations set forth in a carrier's tariff the through rate is ordinarily applicable in the same manner as if the reconsignment had not been made. It is important, however, that a shipper fully comply with the conditions in a carrier's tariff in order that it may be accorded the privilege extended by a carrier. This is readily apparent from the quotation in the case of *Detroit Traffic Association v. Lake Shore & M. S. R. Co.,* 21 I.C.C. 257, 258, which is set forth at pages 24 and 25 of appellant's brief, from which the following is quoted:

> "* * * while reconsignment is a privilege that exists only under the permission granted in the tariff and that must be exercised only under the rules and conditions there laid down."

The instant shipments were never intended for delivery at Sweetgrass, Montana. Their original destination *as through shipments* under the bill of lading contracts executed at the points of origin in Canada was Ogden, Utah. The appellant's reconsignment instructions were contained in a letter dated April 12, 1944, addressed by Earl C. Corey, Regional Director of the Commodity Credit Corporation at Portland, Oregon, to Great Northern Railway Company at Portland, Oregon (R. 69). Six of the shipments were in the course of transportation to Ogden, Utah, at the time the reconsignment instructions were furnished and two of the shipments did not commence their transportation to Ogden, Utah, until a subsequent date (R. 36).

The appellant's reconsignment instructions were accomplished at Sweetgrass not because of any fiction of re-

shipment from that point but solely for the reason that that happened to be the most convenient point from the standpoint of railroad operation where those instructions could be accomplished.

It is difficult to understand how there could be a "reshipment" from Sweetgrass because the shipments were not destined to that point and at no time came to rest at that point as the termination of a transportation journey. The appellant's reconsignment instructions requested a change in destination of the shipments from Ogden, Utah, to Spokane, Washington, and as indicated herein this change happened to be made effective at Sweetgrass. There is absolutely nothing under the facts or by way of any fiction which would constitute a reshipment from that point.

CONCLUSION

For the reasons indicated herein, the judgment and opinion of the trial court is correct and should be affirmed.

Dated San Francisco, Calif.,
April 26, 1950

Respectfully submitted,

GEORGE L. BULAND,
A. T. SUTER,
Attorneys for Appellee.

(Appendix follows)

APPENDIX A

INTERSTATE COMMERCE COMMISSION
Office of the Sec'ty
Washington 25

April 12, 1946
174124

Mr. L. B. Fitzgerald, T.M.
Colorado Milling & Elevator Co.
Denver, Colorado

Dear Sir:

Further reference is made to the above informal complaint respecting the charges on a carload of wheat moving from Nobleford, Alberta, on July 25, 1944, to Los Angeles, Cal.

The shipment was inspected north of the U. S.-Canadian Border, inspected at and subsequently diverted or reconsigned from Spokane, Wash., to Canoga Park, Cal., rediverted at Klamath Falls, Ore., to Los Angeles, where delivery was accomplished. Charges were assessed at a combination rate of 114 cents, composed of factors of 14 cents origin to Sweetgrass, 56 cents Sweetgrass to Klamath Falls, and 44 cents beyond.

S. P. I.C.C. 4574, Sup. 24, in effect on the date of origin of the shipment, provides that not more than two inspections, or one inspection in addition to a diversion or reconsignment enroute, will be permitted, except that if, after the car has received the two inspections, or one inspection and one diversion or reconsignment enroute, it is subsequently inspected, diverted or reconsigned and forwarded without unloading, it will be subject to the com-

bination of rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection, diversion or reconsignment is performed in effect on the date of shipment from point of origin. The number of stops for inspection, diversion or reconsignment shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in the item.

It is plain that the point and date of origin of the shipment are Nobleford, July 25, 1944; that the last and only point of loading of car is Nobleford; that the shipment received two inspections and one diversion or reconsignment between Nobleford and its departure from Spokane; that, under the terms of the Rule, the shipment became subject to the combination rate at the point where it received its diversion after the two previous inspections; that the shipment was entitled to the diversion reckoned from the point at which it became subject to the combination rate. It is our informal view that the applicable combination rate is based on Spokane rather than Klamath Falls, provided there is nothing in the tariffs to the contrary. None of the tariffs naming the linehaul rates have been examined nor have we determined the applicable charge for inspection or diversion.

The complainant urges that as the factor from origin to the border is not on file with this Commission the provisions of the Rule apply only to that portion of the transportation in the U. S., and that the Canadian inspection is not to be considered. The Rule in the S. P. tariff sets the terms under which the diversion privilege is granted, and if the shipper avails himself of the privilege, he is bound

by the terms thereof. The Rule is plain that its terms apply from point of origin of the shipment on the date of origin, and we are unable to conclude that the shipment originated at the boundary on the date it was forwarded therefrom. The complaint is denied on the informal docket and attention called to Rule 25(f) of the Rules of Practice.

Respectfully,

W. P. Bartel

No. 12427

In the United States Court of Appeals for the Ninth Circuit

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

H. G. MORISON,
Assistant Attorney General,
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United States Attorney,
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Of Counsel:
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Attorneys, Department of Justice.

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AUTHORITIES CITED

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In the United States Court of Appeals for the Ninth Circuit

No. 12427

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

A. Significant errors in appellee's brief

Appellee errs significantly in arguing as follows:

Error 1. That the tariffs plainly support appellee's interpretation without ambiguity and that this Court cannot avoid it, however "unjust, unreasonable, discriminatory, prejudicial, and unlawful" it may be (Appellee, p. 15).

Appellant has no doubt but that this Court can avoid the discriminatory interpretation, and it should do so in the interest of simple fairness. There was plenty of ambiguity.

Error 2. That the shipments must be treated as "through" shipments at Sweetgrass, *tariffwise,* instead of as combinations of a local shipment into Sweetgrass and a local (or flat) shipment out of Sweetgrass.

There was no rate through Sweetgrass. Tariffwise, these were, of course, combinations of shipments.

Error 3. That the carriers' formal "clarification" of the Great Northern rule, which explicitly defined its application to this type of situation, was really not a clarification (although so characterized on its face), but was instead a rate decrease misleadingly labeled.

See discussion below.

Error 4. That to qualify for the low rate from Sweetgrass either the Canadian shipper or appellant should have had the cars unloaded and reloaded at Sweetgrass.

This would be a meaningless wasteful and uneconomic ceremony and is never required for a reshipment.

Error 5. That the shipments did not become subject to the "combination of rates" provided in the Great Northern tariff and tariff rule until they arrived at Spokane (Appellee, p. 4).

They became subject to such a combination at Sweetgrass, and the carriers themselves so urged. See discussion below.

Error 6. That there was an Interstate Commerce Commission "decision" against appellant on this issue which is entitled to "great weight" by this Court (Appellee, p. 6).

The trial court rejected the letter from Mr. Bartel which appellee prints in its Appendix. "In any event the Secretary to the Commission was without authority to bind the Commission in this matter." *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 146. The facts were not fully presented or considered, nor were the tariffs examined.

Error 7. That "no good purpose will be served" by the Court's considering appellant's demonstration that appellee's interpretation is absurd.

If the shipments could be shown to have stopped twice in Canada instead of just once, then appellee would grant the low rate in the United States; so appellee is penalizing appellant because the shipments had received too many Canadian stops and also *too few.* This *reductio ad absurdum* is irrefutable and performs the good purpose of showing that under appellee's interpretation the rule becomes absurd.

Error 8. That the transactions at Sweetgrass did not occur at Sweetgrass because of any reconsignment (or "fiction of reconsignment") there but "solely for the reason that that happened to be the most convenient point from the standpoint of railroad operations where these instructions could be accomplished," and that Ogden was the true destination (Appellee, p. 21).

Error 9. That it is "certainly unique and novel" for appellant to be willing to waive the privilege of having the reshipment at Sweetgrass treated as a reconsignment—if the Court should find appellant's interpretation of the rule wrong and appellee's right.

In that event, the "privilege" would be merely the dubious privilege of paying more taxpayers' funds to the carriers, which appellant ought to be entitled to waive. Appellee affects not to perceive appellant's important Point B (Appellant, pp. 23–25).

B. Of course the tariffs are ambiguous

This controversy itself evidences plenty of ambiguity. It began when appellee's agent presented the freight

bills on the original basis (which is still appellant's basis) and then changed over to the revised basis (which is appellee's present basis). Appellee says (p. 10) that "it is difficult to follow appellant's reasoning that because this was done there was ambiguity." Would appellee seriously argue that because this was done there was clarity?

The clarification

While admitting that the carriers' amendment to the Great Northern rule purported to be for "clarification", appellee's view is that it was really not clarification at all but an alteration in substance, which should be ignored under *Southern Pacific Co.* v. *Lothrop,* 15 F. (2d) 486, and *Louisville & Nashville Ry Co.* v. *Speed-Parker Inc.* 137 So. 724 (Appellee, p. 13). The significance of the amendment, however, was that it was not an alteration in substance. That is what "clarification" means. The Interstate Commerce Commission's Rule 2 (a) in its Tariff Circular 20 requires that all amendments be marked by uniform symbols as either reductions in the rate, increases in the rate, or amendments which do not reduce or increase the rate. All changes in language must be marked with the proper symbol showing just which kind of amendment is involved. The amendment in question bore the symbol of the last type, that is, an amendment which did not increase or decrease the rate.

Tariff Rule 2 (a) reads as follows:

Changes to be indicated in tariff or supplement.

2. (*a*) All tariff publications and supplements thereto must indicate changes thereby made in existing rates or charges, rules, regulations or practices, or classifications by use

of the following uniform symbols in connection with such change:

♦ to denote reductions.

◆ to denote increases.

▲ to denote changes in wording which result in neither increases nor reductions in charges.

The title page of the tariff supplement containing the amendment corresponds to the title page of the original (R. 66) except that the supplement is numbered "Supplement No. 61 to G. N. Ry. G. F. O. No. 1240–P, I. C. C. No. A–8137." The amendment to Rule 143 appears on page 10, the relevant portion of which reads as follows:

SECTION 2

RULES AND CHARGES GOVERNING GRAIN; SCREENINGS FROM GRAIN, UNGROUND, CONTAINING NOT MORE THAN 5 PER CENT OF FLAXSEED; SEEDS (FIELD OR GRASS); SOYBEANS; HAY; STRAW; CORN HUSKS OR CORN SHUCKS, AND PUMMIES, UNGROUND; CARLOADS, STOPPED FOR INSPECTION AND DISPOSITION ORDERS INCIDENT THERETO; ALSO RULES AND CHARGES GOVERNING GRAIN OR SEEDS, CARLOADS, HELD OR STOPPED AT SAMPLING POINT.

ø#Ⓔ Item No. 143–E Cancels 143–D. Cars Placed on Track for Inspection and Held for Disposition Orders.

ø Effective February 26, 1949, except as noted.

Effective February 14, 1949, on Montana Intrastate traffic. Issued on twenty days' notice under authority of Mont. R. C. Authorization No. 2057 of December 14, 1948.

Ⓔ Expires with December 31, 1949, unless sooner cancelled, changed, or extended.

Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car, ▲ or the point where the car comes in possession of carriers within the United States, or from the point at which it becomes subject to combination of rates as provided in this rule.

(SF 5963–1186)

[33] ‡ Item No. 148. Disposition order when an embargo is in force.

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[33] Reissued from Supplement No. 33, effective February 1, 1947.

‡ Will not apply on Minnesota intrastate traffic.

▲ Change other than advance or reduction.

A disposition order will not be accepted under these rules at or to a station or to a point of delivery against which an embargo is in force, but a shipment made under an authorized permit is not subject to this condition.

(SF 5963–1138)

By using the triangle symbol ▲ the carriers solemnly stated that the words so marked were mere clarification which did not change the rate, that what had become explicit in the amended definition was always implicit in the original. All agree that under the amended definition the rate from Sweetgrass for these shipments would be 68¢—therefore that was the rate under the original. The carriers were right and appellant is right, and for appellee now to deny it would be to say that the amendment amounted to a misrepresentation.

History of the clarification

The carriers had taken the position all along that appellant's view (the original basis) was correct. An informal opinion had been solicited from an officer of the Interstate Commerce Commission. In that connection the carriers argued just the opposite of the way appellee argues now. They said that the informal opinion was "in error" because the rule should be read in light of the established trade principle that each factor of a flat combination rate carried with it the privileges pertaining to each factor, and that the shipment in the United States, under established principles of tariff reading, should be treated ratewise as having originated at the border point. They argued that the point at which the Canadian grain became "subject to

have done. Numerous undercharges outstanding unquote. 108."

and your reply of the same date, viz:

"108. Have discussed question with Assistant Directors Brown and Chapdelain of Commission. They rule informally in which I concur that the inspections and reconsignments in Canada or at the border must be counted C–66."

Pursuant to communication received from an interested member of the National Diversion and Reconsignment Committee, as quoted in Docket Advice No. NDR–1106 of April 27, 1945, copy attached hereto, the Committee at meeting held here May 23, 1945, decided to refer the subject to a Special Committee for consideration and report.

The Special Committee at meeting held here June 1, 1945, after considering the subject decided that the Interstate Commerce Commission's informal ruling is in error, for the reason that it is an established rule of the I. C. C. that each factor of a flat combination of rates carries with it the privileges pertaining to each of those factors, and that in the instant case since there is a flat combination over the international border point the shipment should be treated the same as if originating at such border point and be permitted the same number of inspections as is authorized in connection with the local rate from and to border point, namely two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded. The foregoing is in harmony with Rule 5 of the General Diversion

and Reconsignment Rules governing Grain, Seeds, etc., carload, held for Inspection and Disposition Orders, the second paragraph of which reads, viz:

"In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in this item."

and it will be noted from the above quoted paragraph that if the shipment becomes subject to combination of rates the number of stops shall be reckoned to and from the point at which such combination becomes effective. Inasmuch as shipments from Canada usually move on combination of local rates to and from International border points, the shipper is entitled to the same consideration as if the movement had been entirely between points within the United States moving on combination of local rates.

The National Diversion and Reconsignment Committee has concurred in the views of the Special Committee stated above.

Kindly advise if you will undertake to have the Interstate Commerce Commission accept the foregoing conclusion in lieu of its informal ruling mentioned in your telegram herein referred to.

Yours very truly,

/s/ E. Morris, *Chairman.*

P. S.: In view of the foregoing conclusions there is at the present time before the members of the National Diversion and Reconsignment Committee, the question of amending the involved Rule 5, by eliminating from the second

paragraph the following words "as provided in this item."

E. M.

Rather than go through a formal proceeding, the carriers decided to dispose of the matter by simply filing the clarification, in which they adhered to appellant's view that for purposes of applying the Great Northern tariffs to these shipments the point of origin was to be regarded as the border point. Beyond that point the scope of the tariffs did not extend, either northward in space or backward in time. The scope of Rule 143 is expressly limited on the title page to a consideration of diversions, reconsignments, or inspections on the Great Northern System (R. 66).

By way of analogy, it is observed that the Southern Pacific time table provides special rules governing certain stops of westbound trains to San Francisco. One rule provides that certain stops will be made only to detrain passengers from Ogden or beyond. Supposing, however, that the rule merely provided for the train to stop for passengers from Ogden, and that a traveler from Chicago via Ogden should desire to utilize the privilege, it would be unthinkable for the conductor to deny him the privilege on the ground that his point of loading was beyond Ogden. That is because by common usage a rule granting the privilege to passengers from Ogden (which is the Southern Pacific's starting point) would be understood to extend to passengers from beyond Ogden.

Similarly, in applying Rule 143 as originally worded, appellant submits that the privileges which were extended to shipments loaded at Sweetgrass (which is the

Great Northern's starting point) apply likewise by customary understanding to shipments loaded beyond Sweetgrass. In other words, it is enough to state that the point of loading for these shipments was "Sweetgrass or beyond".

The carriers' clarification ought to have ended this controversy. At any rate, there is sufficient ambiguity to warrant the Court's applying the standard rules of construction as urged in appellant's opening brief. All of the rules point to appellant's interpretation.

C. In any event, appellant is surely entitled to have these shipments treated as favorably as if they had been loaded at Sweetgrass

In Point B of the opening brief (pp. 21–23) appellant argues that if appellee's present view of Rule 143 is correct, then the "privilege" of reconsignment has boomeranged into a serious penalty, and that appellant is therefore entitled to waive the inverted benefit. The Interstate Commerce Commission was quoted defining the difference between reconsignment and reshipment. The lexicon of tariff terminology is not scientifically exact or uniform, but it seems clear that the essence of reconsignment is an offer by the carriers, when applying their tariffs, to treat a reshipment as if it had not occurred and to apply the principle of constructive continuity of transportation right through the point where the shipment actually stopped and was reshipped in order to confer the privilege of a lower rate through the reshipment point.

The word "reconsignment" is not apparently universally used. Where the Great Northern Rules Tariff's

title speaks of "rules and charges governing the diversion or reconsignment * * *" a corresponding Canadian Pacific Tariff's title speaks of "stopover and reshipping arrangements." Canadian Pacific Railway Co. Tariff No. E–3050, Section No. 3, I. C. C. No. E–2295.[1] Item No. 90 therein refers to shipments "reshipped without breaking bulk."

Our point is that a reconsignment is a reshipment, to which the carriers have agreed to apply the principle of constructive continuity, but that if the constructive continuity (being a special privilege) operates to penalize, the shipper is entitled to ignore the fiction and to have the reshipment stand as a simple reshipment.

Appellee asserts that "the instant shipments were never intended for delivery at Sweetgrass, Montana. Their original destination as through shipments * * * was Ogden, Utah." Appellee also asserts that the reconsignments were accomplished at Sweetgrass solely for convenience from the standpoint of railroad operation, arguing that nothing of consequence really happened at Sweetgrass, even going so far as to say that "there is absolutely nothing under the facts or by way of any fiction which would constitute a reshipment from that point" (Appellee, p. 21). Both of these assertions are incorrect, insofar as the United States carriers are concerned.

The significance of Sweetgrass can be appreciated from the following *précis* of what happened there. A Canadian shipper (not appellant) shipped the grain to Sweetgrass with freight thereto prepaid, and with in-

[1] Filed with the Interstate Commerce Commission for information only.

structions to Canadian Pacific to put the cars on Great Northern tracks at Sweetgrass for the order of appellant. The sale of the grain and the passage of title thereto were accomplished at Sweetgrass. Canadian Pacific's duty to its shipper under its tariffs and under its contracts of carriage was completed at Sweetgrass. Great Northern never actually had any relation with the original shipper, whose bills of lading were "accomplished" at Sweetgrass.

Before the grain arrived at Sweetgrass, Great Northern had received instructions from appellant to "divert" it to Spokane "for inspection and diversion." Instructions on the Canadian Pacific bills of lading for movement to Ogden as a diversion point (not as a destination) were eradicated from the picture before Great Northern received the shipments and were therefore never effective. When Great Northern received the shipments at Sweetgrass, appellant, who became the owner and the shipper at Sweetgrass, surrendered the Canadian bills of lading and became thus entitled to new bills of lading issued by Great Northern at Sweetgrass. What had happened was that Sweetgrass had replaced Ogden.

The cars were then received by Great Northern for transportation under the terms of a United States Uniform Bill of Lading, issuable to appellant to Spokane for inspection and diversion, being there reconsigned to Petaluma. Great Northern's obligation was to transport the shipments under its tariffs from Sweetgrass. What we have is not single, uninterrupted shipments through Sweetgrass but combinations of a shipment by one shipper over one carrier under one bill of

lading and one tariff into Sweetgrass, with another shipment by another shipper over another carrier under another bill of lading and another tariff out of Sweetgrass. No rituals of unloading and loading at Sweetgrass were required for the procedure of the shipper from Sweetgrass.

CONCLUSION

All that appellant seeks is the benefits granted to shipments from Sweetgrass, under the tariffs which, although complicated, require the carrier to accept appellant's interpretation—either on their plain wording or on application of the established rules of construction.

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General.

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United States Attorney.

C. ELMER COLLETT,
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Attorneys for Appellant.

Of Counsel:

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Attorneys, Department of Justice.

U. S. GOVERNMENT PRINTING OFFICE 1958

No. 12428

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM P. THORNTON,

Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Western District of Washington.
Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

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5th at Spring,
Seattle 4, Washington.

MARION GARLAND, JR.
Proctor for Appellee,
104-8 Dietz Bldg.,
Bremerton, Washington.

In the District Court of the United States for the State of Washington, Western District, Northern Division

No. 15377

WM. P. THORNTON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff, Wm. P. Thornton, and for cause of action against the United States Government, defendant, alleges:

I.

That plaintiff is a citizen of the United States of America and at all times herein mentioned a resident of Kitsap County, Washington. That plaintiff is pursuing a claim against the United States of America for service pay while serving as Night Mate aboard an Army Vessel, that is, on the Gocher Victory, for several weeks, and this court has jurisdiction of the plaintiff and of his claim for unpaid wages, and of this suit by virtue of United States Code Annotated, Title 28, Judicial Code and Judiciary, Sec. 41, Div. 20, concurrent with the United States Court of Claims.

II.

That from July 10, 1947, to August 14, 1947, for a period of thirty five (35) days, plaintiff was employed by the War Department (Army) of the United States of America, at the immediate instance of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, for fifteen hours per day as Night Mate aboard the Army Transport, Gocher Victory, the hours being from 4:30 P.M. in the afternoon until 8 o'clock A.M. the following morning, at the rate of $17.25 for a fifteen hour shift, and performing work and rendering services to the defendant which otherwise would have been performed by other *personell* of the same or similar rating to that of the plaintiff, whereby the defendant became indebted to plaintiff in the amount of $603.75 for services rendered as aforesaid, no part of which has been paid, although duly claimed and demanded by plaintiff.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of $603.75 and for costs of suit.

/s/ MARION GARLAND, JR.,
Attorney for plaintiff.

State of Washington,
County of Kitsap—ss.

Wm. P. Thornton, being first duly sworn on oath, deposes and says: that he is the plaintiff above named, that he has read the foregoing complaint,

knows the contents thereof, and believes the same to be true.

/s/ WM. P. THORNTON.

Subscribed and sworn to before me this 7th day of June, 1948.

[Seal] /s/ MARION GARLAND, JR.,
Notary Public in and for the State of Washington, residing at Bremerton.

[Endorsed]: Filed July 7, 1948.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Marion Garland, Jr., plaintiff's attorney, whose address is 107 Dietz Building, Bremerton, Washington, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

MILLARD P. THOMAS,
Clerk of Court.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

Date: July 7, 1948.

Received July 7, 1948, U. S. Marshal, Seattle, Wash.

Return on Service of Writ attached.

[Endorsed]: Filed July 9, 1948.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue process to be served with copy of Complaint on defendant.

July 7, 1948.

/s/ MARION GARLAND, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed July 7, 1948.

[Title of District Court and Cause.]

APPEARANCE

To: Wm. P. Thornton, Plaintiff herein, and to Marion Garland, Jr., his attorney:

You, and Each of You, will hereby please take notice that J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, hereby enter their appearance as attorneys for the defendant above named, and you will please serve all notices, pleadings and papers in connection with said case upon them at their address stated below.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

Copy received Sept. 11, 1948.

[Endorsed]: Filed September 13, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, defendant in the above entitled cause, and for answer to the complaint on file herein, admits, denies and alleges as follows:

I.

Answering paragraph I, the defendant alleges it does not have sufficient information to form a belief as to the citizenship or residence of the plaintiff and therefore denies the said allegations. Further answering said paragraph, defendant denies each and all of the other allegations thereof.

II.

Answering paragraph II, the defendant denies each and all of the allegations thereof and specifically denies that the defendant is indebted to the plaintiff in the amount of $603.75 or in any other amount whatsoever.

Wherefore, having fully answered, the defendant prays that this action be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

Copy received October 27, 1948.

[Endorsed]: Filed October 28, 1948.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue subpoenaes for the following witnesses on behalf of plaintiff:

Harry Leighton, Ass't Marine Superintendant.

Boffman, Principal Marine Supt. Army Transportation subpoenae duces tecum produce Rough Log Book and Permanent Log of Army Transport SS "Goucher Victory."

General Jacobs.
George Merrill, Dispatcher, Marine Supt. Office.
John Miller, T-45 Kenedale.
[In margin] At Seattle Port of Embarkation.
5/13/49.

/s/ MARION GARLAND,
Attorney for Plaintiff.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To General Jacobs, c/o Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the

city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Return on Service

Returned unserved at request of Attorney for Plaintiff.

May 16, 1949.

J. S. DENISE,
U. S. Marshal.

By /s/ DONALD F. MILLER,
Deputy.

Received May 13, 1949, U. S. Marshal, Seattle, Wash.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To George Merrill, Dispatcher, Marine Supt's. Office, Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Received May 13, 1949. U. S. Marshal, Seattle, Wash.

Return on Service of Writ acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To Harry Leighton, Asst. Marine Superintendent,
Seattle Port of Embarkation.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at ten o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein Wm. P. Thornton is Plaintiff and U. S. A. is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Received May 13, 1949, U. S. Marshal, Seattle, Wash.

Return on Service of Writ acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA DUCES TECUM

To John Doe (whose true Christian name is unknown) Boffman, Principal Marine Supt., Army Transportation at Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said District, on the 7th day of June A.D. 1949, at 10 o'clock A.M. of said day, and also that you bring with you and produce at the time and place aforesaid Rough Log Book and Permanent Log of Army Transport SS "Goucher Victory" then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May A.D. 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Return on Service

Received this writ at Seattle, Washington on May 13, 1949 and on May 17, 1949, at Seattle, Washington, I served it on the within-named John Doe Boffman, whose true and correct name is George Boffman, and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.
By /s/ EDWARD C. SCULLY,
Deputy.

Received May 13, 1949, U. S. Marshal, Seattle, Wash.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

PRAECIPE

To Millard P. Thomas, Clerk of the Above Court:

You will please issue and deliver to the United States Marshal for service subpo*ne*as for the following named witnesses to appear and testify on behalf of the plaintiff on June 7, 1949.

Capt. Rennie Collinge, 3022 50th S. W., Seattle, Washington.

Nels Berg, 3412 W. 57th St., Seattle, Washington.

Dated this 21st day of May, 1949.

MARION GARLAND,
Attorney for Plaintiff.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA .

To Captain Rennie Collinge, 3022 50th S. W., Seattle, Washington.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 24th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND &
FRANK HUNTER,
Attorneys for Plaintiff.

U. S. Marshal's Civil Docket No. 20280.

Return on Service of Writ acknowledged.

Received May 24, 1949, U. S. Marshal, Seattle, Wash.

[Endorsed]: Filed May 26, 1949.

CIVIL SUBPENA

To Nels Berg, 3412 West 57th St., Seattle, Washington.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Wash., at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A. M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 24th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND and
FRANK HUNTER,
Attorneys for Plaintiff.

U. S. Marshal's Civil Docket No. 20280.

Received May 24, 1949, U. S. Marshal, Seattle, Wash.

No. 2046

Western District of Washington—ss.

I hereby certify and return, that on the 24th day

of May, 1949, I received the within Civil Subpena and that after diligent search, I am unable to find the within-named defendant Nels Berg within my district.

Reported by his Wife that Nels Berg is enroute to Japan not expected back for about two months.

J. S. DENISE,
United States Marshal.

By /s/ JAMES BRIDGES,
Deputy United States
Marshal.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant above named and respectfully moves the court to dismiss the above-entitled action upon the following grounds:

I.

This court is without jurisdiction of the subject matter of this proceeding, which has been instituted under the provisions of the Tucker Act.

II.

That plaintiff is an "officer of the United States" and is excluded by the express provisions of the

Tucker Act from bringing this action to recover "compensation for official services of officers of the United States."

/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM ON ON MOTION TO DISMISS

While defendant has answered plaintiff's complaint, the question at the threshold is as to this court's jurisdiction of the subject-matter of the action.

The suit has been commenced under the provisions of the Tucker Act, Title 28, U.S.C., 1346(d2). (Old Title 28, U.S.C., 41(20)).

It is therein provided (Sec. 1346(d2)):

"(d) The district court shall not have jurisdiction under this section of

(1) * * *

(2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States."

Plaintiff Is An Officer of the United States

The meaning of the words "Officer of the United States" is to be found in Art. 2, Sec. 2, Clause 2, of the Constitution.

Clause 2 (with respect to the powers of the President) reads:

"* * * and he shall nominate, and by the advice and consent of the Senate shall appoint Ambassadors * * * and all other officers of the United States, whose appointments are not otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of inferior officers, as they think proper, in the President alone, and the Courts of Law, or in the Heads of Departments."

The United States Supreme Court has considered the meaning of the above provisions of the Constitution and the Tucker Act at length in the cases of United States v. Hartwell, 73 U. S. 385; United States v. Germa, 99 U. S. 508; United States v. Mouat, 124 U. S. 303 and Burnap v. United States, 252 U. S. 512.

In United States v. Hartwell, supra, the General Appropriation Act of July 23, 1866, authorized the Assistant Treasurer at Boston, with the approbation of the Secretary of the Treasury, to appoint a clerk. The court held that the defendant "was appointed by the head of a department within the meaning of the constitutional provision" and was an officer. At p. 393, the Court said:

"An office is a public station or employment conferred by the appointment of government. The term embraced the idea of tenure, duration, emolument and duties."

In Kennedy v. United States, 146 F(2) 26, a decision of the Fifth Circuit Court of Appeals in April, 1944, a Junior Instructor of Shop Mathematics of the Air Corps at large was held an "officer of the United States" within the meaning of Art. 2 Sec. 2 of the Constitution and the Tucker Act, Title 28, U.S.C. 41(20) and plaintiff's suit to recover fees, salary and compensation for official services was dismissed. The court there said (p. 28):

"The stipulated facts show that while appellant was appointed by a subordinate executive officer, his appointment was made with the approval of the Secretary of the War Department, acting pursuant to Acts of Congress which authorized the position to which appellant was appointed and appropriated funds for the payment of the salary therefor. Appellant's appointment was for an indefinite period and his duties were set forth in an official manual issued by the War Department under express statutory authority."

The complaint in the instant case alleges in the first paragraph thereof, inter alia:

"* * * That plaintiff is pursuing a claim against the United States of America for service pay while serving as night mate aboard an Army Vessel, that is, on the Cocher Victory, for several weeks * * *."

It is therefore respectfully submitted that this

Honorable Court is without jurisdiction of this action and the same should be dismissed.

Respectfully submitted,

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To John Miller, T-45 Kenedale, Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western Dist. of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May,

A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
For Plaintiff.

Received May 13, 1949, United States Marshal, Seattle, Wash.

Return on Service of writ acknowledged.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

PETITION FOR AN ORDER GRANTING LEAVE TO PLAINTIFF TO TRANSFER THIS ACTION TO THE ADMIRALTY SIDE OF THE COURT

Comes Now the plaintiff, William P. Thornton, and respectfully petitions this Honorable Court for an order granting leave to him to amend his action at law herein to invoke the jurisdiction of this court in admiralty under the provisions of the Public Vessels Act 46 U.S.C.A. Section 781, et seq. Plaintiff respectfully represents to the court that this cause of action has proceeded as an action of law to the point where the taking of evidence has been

concluded and question has arisen as to whether plaintiff has shown that this court has jurisdiction of his claim for services rendered under the provisions of the Tucker Act 28 U.S.C.A. Section 1346-D-2 or whether plaintiff should seek for relief under the Public Vessels Act 46 U.S.C.A. Section 781 and plaintiff's counsel now being satisfied that jurisdiction should be invoked under the Public Vessels Act he now tenders an amended libel in personam against the United States for filing.

Wherefore, plaintiff prays that his petition be granted and that any and all further proceedings herein be transferred to the admiralty side of the court.

/s/ MARION GARLAND, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

NOTICE OF HEARING ON PETITION FOR LEAVE TO TRANSFER THIS CAUSE TO THE ADMIRALTY SIDE OF THE COURT

To: J. Charles Dennis, United States Attorney and John E. Belcher, Assistant United States Attorney
and

To: Millard Thomas, Clerk of the Court:

You and each of you will hereby take notice that the plaintiff on Monday, July 11, 1949, at 10:00

A. M. or as soon thereafter as counsel may be heard will present to the Court plaintiff's petition seeking an order of said court granting leave to plaintiff to file an Amended Libel in Personam against the United States and transferring any and all further proceedings herein to the admiralty side of said court; copy of which petition along with proposed amended libel is hereto attached and the Clerk will please note this motion on a motion calendar of said court.

/s/ MARION GARLAND, JR.,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

AMENDED LIBEL IN PERSONAM FOR WAGES

To the Honorable Judge of the United States District Court, Western District of Washington, Northern Division:

In Admiralty

The libel of William P. Thornton, against the United States of America, in a cause of contract and wages, civil and maritime, respectfully shows:

First: That upon information and belief at all times herein mentioned the respondent, the United States of America, was the owner of the United

States army transport, Goucher Victory, a public vessel, on Puget Sound and not a merchant vessel.

Second: That libelant is a citizen of the United States of America and at all times herein mentioned was and is a resident of Bremerton, Kitsap County, Washington, within the jurisdiction of this court. That libelant is pursuing a claim against the United States of America for service pay while serving as night mate and watchman aboard an army vessel, that is on the Goucher Victory, a public vessel, for several weeks and this court has jurisdiction of libelant and of his claim of unpaid damages and of this suit under and by virtue of the Suits in Admiralty Act of March 9, 1920 46 U.S.C.A. Section 741 et seq.; and the Public Vessel Act 46 U.S.C.A. Section 781 et seq.

Third: That from July 10, 1947, to August 14, 1947, for a period of thirty five (35) days, plaintiff was employed by the War Department (Army) of the United States of America, at the immediate instance of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, for fifteen hours per day as Night Mate aboard the Army Transport, Goucher Victory, the hours being from 4:30 P. M. in the afternoon until 8:00 A. M. the following morning, at the rate of $17.25 for a fifteen hour shift, and performing work and rendering services to the respondent which otherwise would have been performed by other *personell*

of the same or similar rating to that of the libelant, whereby the respondent became indebted to libelant in the amount of $603.75 for services rendered as aforesaid, no part of which has been paid, although duly claimed and demanded by libelant.

Fourth: That libelant was assigned and entered into his duties as Night Mate and watchman under oral contract on the 10th day of July, 1947, and continued employment and rendered services under said contract until and including the 14th day of August, 1947.

Fifth: That libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformidable to the provisions of Title 28, Section 837 U.S.C.A.

Sixth: That this action is brought pursuant to Public Vessels Act (46 U.S.C.A. Section 781 et seq.)

Seventh: That all and singular the premises are true and in the admiralty and maritime jurisdiction of this honorable court.

Wherefore, libelant prays that a citation in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the respondent the United States of America and that respondent may be required to appear and answer this libel, and all and singular the matters aforesaid, and that this honor-

able court may be pleased to decree payment to libelant by respondent the sum of $603.75 together with his costs of suit incurred herein and for such further relief as may be just and proper.

/s/ MARION GARLAND, JR.,
Proctor for Libelant.

United States of America,
Western District of Washington,
Northern Division—ss.

William P. Thornton, being first duly sworn on oath says that he is the libelant above named and makes this verification; that he has read the foregoing libel, knows the contents thereof and the same is true to the best of his belief.

/s/ WM. P. THORNTON.

Subscribed and Sworn to before me this 5 day of July, 1949.

[Seal] /s/ MARION GARLAND, JR.,
Notary Public in and for the State of Washington, residing at Bremerton.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ORDER TRANSFERRING CAUSE TO ADMIRALTY JURISDICTION

This Matter coming on regularly for hearing and disposition of plaintiff's petition invoking the Admiralty jurisdiction of this Court and praying for

an order transferring this cause to the Admiralty side of this Court and the granting of leave to file a libel in personam against the United States seeking an award of the wages as a seaman for services performed as Night Mate and Watchman aboard the army transport, Goucher Victory, under the provisions of the Public Vessels Act 46 U.S.C.A. Section 781 et seq; and the parties appearing by their respective attorneys of record; and it appearing that this cause has proceeded as a law action under the Tucker Act, 28 U.S.C.A. Section 1346-d-2, and the question has arisen as to whether plaintiff has shown that your Court has jurisdiction of his claim under the Tucker Act, or whether the plaintiff should seek relief under the Public Vessels Act 46 U.S.C.A., Section 781 and the defendant acquiesing in plaintiff's petition; and the plaintiff having tendered, for filing, an amended libel in personam against the United States, and since said tendered libel invokes jurisdiction of this Court under the Suits in Admiralty Act, 46 U.S.C.A. Section 741 et seq; and it further appearing that the vessel involved was a "public vessel" of the United States and not employed as a "merchant vessel", it appears that leave should be granted libelant to amend as prayed so as to invoke jurisdiction under the Public Vessels Act; and the Court being fully advised in the premises;

It Is Ordered and Adjudged that the plaintiff's petition be and same is hereby granted and that any and all further proceedings herein be and same

are transferred to the Admiralty side of this Court.

It Is Further Ordered that the Clerk file said libel in personam and, inasmuch as libelant is a seaman within the designation of persons permitted to sue without furnishing bond or making deposit to secure fees and costs, it is ordered that no such deposit be required of libelant conformable to the provisions of Title 28 U.S.C.A. Section 837; and

It Is Further Ordered that the Clerk, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction do issue process against the respondent United States of America requiring it to appear and answer this libel.

Done in Open Court this 13 day of July, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Approved:

J. CHARLES DENNIS,
U. S. Attorney.

By /s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Presented by:

/s/ FRANK HUNTER,
Of Counsel for Pltf.

[Endorsed]: Filed July 13, 1949.

CITATION

(No. 15377. Same as No. 2046. Transferred to Admiralty on Court Order 7-13-49.)

Western District of Washington—ss.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, Greeting:

Whereas, a Complaint transferred to Admiralty hath been filed in the United States District Court for the Western District of Washington, on the 7th day of July A.D. 1948, by

WM. P. THORNTON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

in a certain action, civil and maritime, for payment of services rendered by the said Libellant, amounting to Six hundred three dollars and seventy-five cents, ($603.75), and praying that a Citation may issue against the said Respondent, pursuant to the rules and practice of this Court:

Now Therefore, We do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your district, that it be and appear before the said District Court, on Wednesday, the 3rd day of August, A.D. 1949, at ten o'clock

in the forenoon of said day, at the Court Room thereof, at Seattle, then and there to answer the said Libel, and to make its allegations in that behalf And have you then and there this writ, with your return endorsed thereon.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in said Western District of Washington, this 14th day of July, A.D. 1949.

MILLARD P. THOMAS,
Clerk.

By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND, JR.,
Proctor for Libellant.

Marshal's Return
With Amended Libel in Personam for Wages

Office of U. S. Marshal,
Western District of Washington—ss.

I hereby certify that I served the within Citation at Seattle, Washington, on the 18th day of July, 1949, on the therein named United States of America by then and there delivering to and leaving with J. Charles Dennis, United States District Attorney, at said time and place, a duly certified copy thereof and by mailing by registered mail a true and correct copy thereof in duplicate to the Attorney General

of the United States of America at Washington, D. C.

J. S. DENISE,
United States Marshal.
By /s/ PATRICK J. BRADLEY,
Deputy Marshal.

Received July 14, 1949, U. S. Marshal, Seattle, Wash.

Return receipt attached.

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

APPEARANCES OF PROCTORS

To the Clerk of the Above Entitled Court:

You will please enter our appearance as proctors for respondent, United States of America, in the above entitled cause, and service of all serviceable papers, except writs and processes, may be made upon said respondent by leaving the same with the undersigned at their address below stated.

/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ JOHN E. BELCHER,
Asst. U. S. Attorney.
/s/ VAUGHAN E. EVANS,
Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 4, 1949.

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT, UNITED STATES OF AMERICA, TO LIBEL IN PERSONAM

Comes now the United States of America and excepts to and moves to dismiss the Libel in Personam filed herein for the following reasons:

1. That the libel herein fails to state a cause of action in that there is a specific allegation that the United States of America was the owner of the United States Army Transport Goucher Victory, a public vessel on Puget Sound, and not a merchant vessel, the statute in such case (Title 46, Sec. 741, U.S.C.) providing in part: "* * * a libel in personam may be brought against the United States * * *, provided such vessel is employed as a merchant vessel * * *."

The foregoing exception is based upon the files and records herein.

/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.
/s/ VAUGHAN E. EVANS,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 4, 1949.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

This suit is brought under the Suits in Admiralty Act (46 U.S.C.A., 741 et seq.) and the Public Vessels Act (46 U.S.C.A., 781 et seq.). The former provides (Sec. 742):

Libel in Personam

In cases where if the vessel were privately owned or operated * * * a proceeding in Admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel. * * * The Libelant shall forthwith serve a copy of his libel upon the United States Attorney * * * and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing."

In his complaint, libelant, in Paragraph 1 alleges:

"That upon information and belief at all times herein mentioned, the respondent United States of America was the owner of the United States Army Transport Goucher Victory, a public vessel, on Puget Sound and not a merchant vessel."

Under this allegation then, libelant does not bring himself within the provisions of the Suits in Ad-

miralty Act, and this Court is therefore without jurisdiction in the premises.

The Public Vessels Act (46 U.S.C.A., 781 et seq.) is not applicable here because that Act by its terms applies only to suits in Admiralty in suits for damages caused by or for towage or salvage services.

It is, therefore, respectfully submitted that the motion interposed by respondent to dismiss, should be granted.

Respectfully submitted,
/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed August 9, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly to be heard before me on the 9th day of July, 1949; the plaintiff having been present in court and represented by his attorneys, Marion Garland, Jr. and Frank Hunter, and the United States of America having been represented by its attorney, John E. Belcher; the court having heard the testimony of witnesses and the argument of counsel; does hereby make the following

Findings of Fact

I.

That between the dates July 10, 1947 and August 14, 1947, the United States was the owner of an army transport vessel, the Goucher Victory, a public vessel, then on Puget Sound, stationed in the port of Seattle, Washington.

II.

That William P. Thorton, the libelant, is a citizen of the United States of America and at all times since the commencement of this law suit and at all times herein mentioned was and is a resident of Bremerton, Kitsap County, Washington, within the jurisdiction of the above-entitled court. That the libelant claims pay for service while serving as Night Mate and watchman for the army vessel known as the Goucher Victory, owned by the United States of America. That this Court has jurisdiction over the libelant and of the claim for his unpaid wages by virtue of the Public Vessels Act (46 U.S.C.A. Section 781); Court further finds that from July 10, 1947 to August 14, 1947, for a period of thirty-five days libelant was employed by the army of the United States of America, at the request of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, a person having authority to hire the libelant. The libelant, William P. Thornton, worked a total of 525

hours at the rate of $1.15 per hour, making a total amount earned by him in the sum of $603.75. That no amount of said moneys has been paid. That demand has been made for the same.

III.

That the services rendered by William P. Thornton, the libelant, to the United States of America between the dates of July 10, 1947 and August 14, 1947, was that of Night Mate and that said work was necessary work which had to be done for the United States of America. That no other person was hired or designated to do said work. The Court further finds that if the United States Government did not pay the libelant, William P. Thornton, for said work, it would be an unjust enrichment of the United States of America. The Court further finds that the United States, knowing that William P. Thornton, the libelant, was doing the work of Night Mate, allowed him to do said work, accepted said work and received the benefits thereof. That by said acts they created a contract of employment and promised to pay for the service rendered by the said William P. Thornton.

From the foregoing Findings of Fact, the Court does hereby make the following

Conclusions of Law

I.

That the above entitled Court has jurisdiction over the libelant and over the respondent by virtue

of the residence of the respondent and the Public Vessels Act (46 U.S.C.A. Sec. 781).

II.

That the libelant should receive judgment against the respondent in the sum of $603.75, together with interest at the rate of six percent (6%) per annum from date of entry of decree until paid.

To all of which respondent excepts and exception allowed.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Approved and Presented by Marion Garland.

By /s/ FRANK HUNTER,
Proctor for Libelant.

Approved as to form:

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed August 15, 1949.

In the District Court of the United States in and for the Western District of Washington, Northern Division

In Admiralty No. 15377

WILLIAM P. THORNTON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This Cause coming on regularly for trial and hearing before the Honorable John C. Bowen, Judge of the above-entitled court, the libelant, William P. Thornton, appearing in person and with his Proctors of record, the respondent, the United States of America, appearing by the United States Attorney and by John E. Belcher, Assistant United States Attorney; witnesses were duly sworn and testified, and oral testimony and documentary evidence was received on behalf of libelant and respondent, and after argument by counsel, the Court rendered its decision, finding the issues generally in favor of the libelant against the respondent; and Findings of Fact and Conclusions of Law having been duly entered of record and the Court now being fully advised in the premises, it is

Ordered, Adjudged and Decreed that the libelant does have and recover judgment against the respondent in the principal sum of $603.75, together

with interest at the rate of six per cent (6%) per annum from date of entry of this decree.

To all of which respondent excepts and exception allowed.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Approved and Presented:
By /s/ FRANK HUNTER,
Proctor for Libelant.

Approved as to form:
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William P. Thornton, libelant, and Marion Garland, Jr., his proctor; and to the Honorable John C. Bowen, Judge, and Millard P. Thomas, Clerk of the above-entitled Court:

You and each of you will please take notice that the United States of America, respondent in the above-entitled cause, hereby appeals from that certain Decree entered on the 15th day of August, 1949, in the above-entitled cause, wherein the Court

ordered, adjudged and decreed that the libelant recover judgment against the United States of America in the sum of $603.75, with interest thereon at the rate of 6% per annum from date of entry of the Decree, hereby appealing from the whole of the said decree and each and every part thereof, unto the United States Court of Appeals for the Ninth Circuit.

Dated this 8th day of November, 1949.

/s/ J. CHARLES DENNIS,
U. S. Attorney,

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above-Entitled Court:

Utilizing the Transcript of the Record filed herein you are hereby requested to prepare in the above-entitled cause, Apostles on Appeal to the United States Court of Appeals for the Ninth Circuit, supplementing and comparing the transcript to the extent necessary to make index and certify full, true and complete Apostles on Appeal as required by the Admiralty Rules of that court containing the following:

1. Caption showing proper style of the Court and showing title and number of the cause.

2. Introductory statement showing commencement of the action as one of a civil nature, being cause number 2046, names of all parties and addresses of all counsel, dates of filing all pleadings, including motion to dismiss, order transferring to Admiralty, name of trial Judge, dates of trial, date of final decree, date when notice of appeal was filed.

3. The Complaint (Civil No. 2046).

4. The Defendant's Answer.

5. Motion to Dismiss.

6. Petition for order of transfer to Admiralty.

7. Notice of hearing on motion to transfer.

8. Order granting motion for transfer to Admiralty.

9. Amended Libel in Personam (No. 15377).

10. Appearance of Proctors for Respondent.

11. Exceptions of Respondent to Libel in Personam.

12. Findings of Fact and Conclusions of Law.

13. Decree.

14. Notice of Appeal.

15. All testimony of all witnesses taken in open court in both causes 2046 and 15377 with all ex-

hibits in connection with such testimony, including the following exhibits:

(a) Plaintiff's Exhibit 1—Discharge.

(b) Plaintiff's Exhibit 2—Letter April 13, 1948.

(c) Defendant's Exhibit A-1—Application for Refund.

(d) Defendant's Exhibit A-2—Time sheet.

(e) Defendant's Exhibit A-3—Informal buck slip.

(f) Defendant's Exhibit A-4—Circular re personnel.

(g) Defendant's Exhibit A-5—Delegation of authority.

(h) Defendant's Exhibit A-6—Order C.

16. This Praecipe.

/s/ J. CHARLES DENNIS,
U. S. Attorney,
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent, United States of America, hereby respectfully assigns error in the proceedings before the Court and in the Judgment and Decree entered and filed on the 15th day of August, 1949, as follows:

1. That the Court erred in awarding to libelant a recovery in the total sum of $603.75 or any other sum whatever.

2. That the Court erred in allowing the libelant to recover under Public Vessels Act.

3. That the Court erred in allowing the plaintiff recovery of interest in excess of 4%.

/s/ J. CHARLES DENNIS,
U. S. Attorney,
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States

District Court for the Western District of Washington, do hereby certify that I am transmitting as the apostles on appeal in the above-entitled cause, all of the original pleadings and testimony on file in said cause, together with Libelant Exhibits 1 and 2 and Respondent Exhibits A-1 to A-6, inclusive, offered in evidence at the trial of said cause, to wit:

1. Complaint.

2. Praecipe.

3. Marshal's Return on Summons.

4. Appearance of Defendant.

5. Answer of Defendant.

6. Praecipe for subpoenas to Harry Leighton, et al., on behalf of plaintiff.

7. Marshal's Return on subpoena (Jacobs).

8. Marshal's Return on subpoenas (Merrill, et al.).

9. Marshal's Return on subpoenas (John Doe Hoffman).

10. Praecipe for subpoenas, Collinge, et al.

11. Marshal's Return on subpoena (Collinge).

12. Marshal's Return on subpoena (Berg).

13. Motion defendant to Dismiss.

14. Defendant's Memorandum on Motion to Dismiss.

15. Marshal's Return on subpoena (Miller).

15a. Petition for Order Granting Leave to Plaintiff to Transfer Action to Admiralty Side of Court.

16. Notice of Hearing on Petition for Leave to Transfer Cause to Admiralty Side of Court.

16a. Amended Libel in Personam for Wages.

17. Order Transferring Cause to Admiralty Jurisdiction.

18. Marshal's Return on Citation.

19. Appearance of Proctors for Respondent United States.

20. Exceptions of Respondent to Libel in Personam.

21. Respondent's Trial Memorandum.

22. Findings of Fact and Conclusions of Law.

23. Decree for Libelant.

24. Notice of Respondent of Appeal.

25. Reporter's Transcript of Proceedings at Trial.

26. Praecipe for Apostles on Appeal.

27. Assignments of Error.

28. Affidavit of Service.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 13th day of December, 1949.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 15377

WILLIAM P. THORNTON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: The Honorable John C. Bowen, District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

June 22, 1949, 10:00 o'Clock A.M.

Appearances:

MARION GARLAND and
FRANK HUNTER
appearing for and on behalf of plaintiff.

JOHN E. BELCHER,
assistant United States Attorney, appearing for and on behalf of defendant.

The Court: I understand there is a motion pending.

Mr. Belcher: There is a motion pending, if Your Honor please. This is a suit brought under the Tucker Act, as is clearly shown by the pleadings, and we have interposed a motion to dismiss upon

the ground that the Court is without jurisdiction of actions of this type under the Tucker Act. The Statute is Section 1346 of the new title 28 of the code, "District Courts will have original jurisdiction concurrent with the Court of Claims . . ." Then it sets out certain things under subdivision (d) "The District Court shall not have jurisdiction under this section of (1) any civil action or claim for a pension, (2) any civil action to [2*] recover fees, salary, or compensation for official services of officers of the United States."

We are not without authority for the position we are taking, if Your Honor please. The United States Supreme Court has considered the meanings of the provision of the Constitution and of the Tucker Act in the case of United States vs. Hartwell, 73 U.S. 385, United States vs. Germa, 99 U.S. 508, United States vs. Mouat, 124 U.S. 303, and Burnap vs. U. S., 252 U.S. 512.

In the Hartwell case, the General Appropriation Act of July 23, 1866, authorized the Assistant Treasurer at Boston, with the approbation of the Secretary of the Treasury, to appoint a clerk. The Court held that the defendant "was appointed by the head of a department within the meaning of the Constitutional provision" and was an officer. At page 393, the Court said: "And office is a public station or employment conferred by the appointment of government. The term embraced the idea of tenure, duration, emolument and duties."

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

In Kennedy vs. United States, 146 F. (2) 26, a decision of the Fifth Circuit Court of Appeals in April, 1944, a junior instructor of shop mathematics of the Air Corps at large was held an "officer of the [3] United States" within the meaning of Art. 2, Sec. 2, of the Constitution and the Tucker Act, and plaintiff's suit to recover fees, salary and compensation for official services was dismissed. The Court there said, page 28: "The stipulated facts show that while appellant was appointed by a subordinate executive officer, his appointment was made with the approval of the Secretary of the War Department, acting pursuant to acts of Congress which authorized the position to which appellant was appointed and appropriated funds for the payment of the salary therefore. Appellant's appointment was for an indefinite period and his duties were set forth in an official manual issued by the War Department under express statutory authority."

The complaint in the instant case alleges in the first paragraph: ". . . that plaintiff is pursuing a claim against the United States of America for service pay while serving as night Mate aboard an Army vessel, that is, on the *Cocher* Victory, for several weeks . . . ."

If Your Honor please, I think the remedy of the plaintiff in this case was in admiralty and not under the Tucker Act. A suit of this type cannot be brought under the Tucker Act.

The Court: In other words, this is an instance

of [4] the United States of America being a private employer, is that right?

Mr. Belcher: That is right.

The Court: Does the Merchant Marine Act have any specific provisions touching this subject matter?

Mr. Belcher: I think not, Your Honor.

The Court: Does the War Shipping Act or any other acts which relate to the ownership and operation of merchant vessels by the United States have any purported specific provisions that might be contended to be applicable to this situation?

Mr. Belcher: I think not, Your Honor. The ship on which the plaintiff alleges that he performed the service was an Army tug, a ship of the United States assigned to the United States Army.

The Court: I think that this matter is of sufficient importance to justify the Court in reserving ruling on this motion until after the Court hears the testimony in the case on the merits. While you may think that that could be and is to be a loss of time on the part not only of the Court but also of counsel in the case, I am inclined to think it is a better policy.

At the moment, from what counsel has said, I do not feel as clearly convinced of counsel's position as [5] he does, and I feel I should have an opportunity to consider it more, and I can do that best in connection with the hearing of the case on the merits. I will reserve ruling on this motion at least until the close of all the evidence on both sides, and if the Court is requested at that time to again consider it, the Court will do so.

Mr. Belcher: I will reserve argument until that time.

The Court: I think that would be a better economy of time.

Whereupon, opening statement having been made by counsel for plaintiff, the following proceedings were had and done, to wit:

The Court: You may call plaintiff's first witness.

WILLIAM P. THORNTON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [6]

Direct Examination

By Mr. Garland:

Q. Would you give your name, please?

A. William Patrick Thornton.

Q. What is your address?

A. I live in Bremerton, 935 Summit Avenue North, Bremerton, Washington.

Q. What is your occupation at the present time?

A. At this time I am not doing anything.

Q. On July 10, 1947, what was your occupation?

A. I was employed as night Mate on the United States Army transport Goucher Victory.

Q. How did you secure that employment?

A. Called on Captain Leighton and received the position from him.

The Court: How do you spell the word Goucher?

The Witness: G-o-u-c-h-e-r, I believe.

(Testimony of William P. Thornton.)

The Court: I wonder if the spelling of it in the complaint is not erroneous.

Mr. Garland: There is a "U" left out in the complaint, Your Honor.

The Court: The correct spelling is G-o-u-c-h-e-r Victory?

Mr. Belcher: That is correct, Your Honor.

Q. What position did Captain Leighton hold, the man [7] who employed you?

A. Captain Leighton was the Assistant Marine Superintendent.

Q. As a result of the conversation with Captain Leighton, what did you do?

A. Ask that question again.

Q. As a result of the conversation with him, and hiring you, what did you do?

A. I should go back, a little back of Captain Leighton, if you would like it that way.

The Court: It is a question of who was the man who said the word that put you to work, because probably we will want to know what his official position was.

The Witness: Mr. Merrill is the man.

Q. Mr. Merrill put you to work?

A. George Merrill is the name.

Q. Was Captain Leighton an officer of the United States? Was he working for the United States at this time?

A. George Merrill was the dispatcher, I believe.

Q. Who was the first man you contacted?

(Testimony of William P. Thornton.)

A. The first man was Miller.

Q. Was he working for the Port of Embarkation at this time? A. Yes. [8]

Q. What was his position?

A. He was assistant to the head of personnel, in charge of the giving out of jobs to the different deck departments.

Q. What conversation did you have with Miller?

A. I came down to ask him for a job, to the Goodrich Building, and he wasn't in the office so I came out and met him in front of Pier 39. I said, "Say, Miller, what is the chances of my getting one of those night Mate jobs?" He said, "I don't handle that down here any more. Colonel Jennings is the man. In fact," he said, "Captain Leighton is the man you will have to see." So I said, "All right, I know Harry very well," and I went up to Captain Leighton's office and asked him for the position.

Q. What conversation did you have with Captain Leighton? A. What conversation?

Q. Yes.

A. I said, "Harry, I'd like to get one of those night Mate jobs," and he says, "Certainly, Bill, why not? Have you been terminated?" I said, "Well, I don't know. I haven't received a discharge yet." "Well," he says, "we can fix that, I guess. Go out and give your name to George Merrill who is just sitting in the next office."

So I put my name down, and George says, "You

(Testimony of William P. Thornton.)

will have [9] to pay for the long distance call. That will be 35 cents." And I said, "That will be all right." So he said, "All right," and I left the office, and I had only been gone possibly three minutes and a messenger came running after me and he said, "Merrill wants to see you." I came back to Merrill's office and he said, "Will you go on the Goucher Victory?" I said, "Why not? Why, certainly a job is a job for me." He said, "You be down here at four o'clock on July 10." Those were the words that were used.

Q. Was there any discussion as to the amount of pay that you were to receive?

A. About the pay?

Q. Yes.

A. Well, I knew what the pay was.

Q. What was the pay? What were you to be paid? A. What would I be paid?

Q. Yes.

A. $17.25 a day for a fifteen-hour shift.

Q. Did you go to work on the Goucher Victory?

A. I did.

Q. What date was that?

A. That was on the 10th day of July, at 4:30 in the afternoon.

Q. How long did you work on the Goucher Victory?

A. Until August 14th, at 8:00 o'clock in the morning. [10]

Q. Is that 1947?

(Testimony of William P. Thornton.)

A. That is 1947, yes.

Q. What position did you hold?

A. The Army transport called it the night Mate.

Q. Did they require that you have any papers or commissions of any kind?

A. No, my papers were never called on at all.

Q. What were your duties?

A. To stay aboard the ship from 4:30 in the afternoon until 8:00 in the morning.

Q. What did you do aboard the ship?

A. I was in charge of the vessel. It was my duty to see the ship was taken care of in every way.

Q. Was there any other person performing a similar duty to that which you had on that ship?

A. Not at that time.

Q. Were you familiar at the time with the manner in which all the ships that were tied up were being handled by the Port of Embarkation?

A. Ask it again.

Q. Were you familiar with the way the other ships were being handled at the Port of Embarkation?

A. Well, I knew—I had been with the Port for five years.

Q. Did the other ships tied up there have night Mates? [11]

A. The other ships had Mates of the same kind, holding the same kind of position, I mean.

Q. During the time you were working, did you have any further conversations with any of the

(Testimony of William P. Thornton.)

authorities from the Port of Embarkation about your position or your job?

A. Not in regard to the vessel, any more than occasionally. One time she was anchored out in the bay for four or five days and I would come to the Marine Superintendent's office and they would send me out with a tug.

The Court: Ask him questions that will develop the fact as to where the ship was during the time he worked on it.

Q. Where was the ship, Captain?

A. She was first at the Port of Embarkation.

The Court: Where? What city?

The Witness: Seattle.

Q. Here in Seattle?

A. Here in Seattle, yes.

Q. Where was it moored in Seattle, at what pier?

A. I believe 37, first, and then we were shifted to the anchor in the stream, and from there we were shifted to Pier 65, 64 or 65.

Q. That was all in Seattle, Elliott Bay?

A. That was in Seattle, Elliott Bay.

The Court: The last pier was what? [12]

The Witness: I think she was shifted to 65, 64, and then shifted to 65. She was doing some repair work.

Q. Were you directed to where the ship was moored each time?

A. No, I had nothing to do with the direction of the ship when she was being moored.

(Testimony of William P. Thornton.)

Q. How did you find out where the ship was?

A. I was on board when she went each time, with the exception of going out to the bay. I went to the Marine Superintendent to find out where she went out into the bay. After that, I knew where she was because I was on board when she was shifted.

Q. Did you have to give any evidence that you were on board the ship? A. Oh, yes.

Q. What were the actions that you went through to show that you were on board the ship?

A. I reported to the officers of the ship on coming aboard, and when leaving in the morning an officer relieved me.

Q. Did your position build up any leave or retirement pay of any kind?

A. No. That come under a different head, so I was told.

Q. You were told by whom? [13]

A. That wasn't Merrill, it was Amdahl.

Q. What position did Mr. Amdahl hold?

A. Mr. Emdahl was acting directly under Mr. Thomas. I think he was the head, and I believe Merrill was the next in rank.

Q. That is manager of the Port of Embarkation?

A. Of personnel, yes.

Q. In Seattle, Washington? A. Yes.

Q. What was your length of employment? How long were you employed and when were you employed?

(Testimony of William P. Thornton.)

A. You mean during the night mate job?

Q. How could your work be terminated? Did you have any given time of employment?

A. I don't get that.

Q. If the Government saw fit to dispense with your services, how much notice did they have to give you?

A. All I was given at the morning of the 14th, I met John Miller as I was leaving the ship and he asked me, "Are you on the Goucher Victory?" I said, "Yes," and he said, "Did you go through here?" And I said, "Why, no," so he left and I left. I went on home to Bremerton and on arrival there was a telephone message to come right straight back to the Port and then Captain Leighton told me that that would be all for the time being, until this thing was straightened out. [14]

The Court: What thing did you understand he referred to?

The Witness: I suppose on my being employed.

The Court: What kind of a problem was involved with that? What kind of problem was to be straightened out, if you know?

The Witness: They told me since that time that I had been terminated, and I should go through the processing and through the personnel again, but at that time I had not received a discharge and did not receive one until several months afterwards.

Q. What I am getting at, Captain, is, could you

(Testimony of William P. Thornton.)

have been discharged at any time on that position?

A. Yes.

Q. You didn't sign up for a length of the cruise or so many years?

A. All that would have been necessary was to say, 'You're all through."

Q. How much money did you have coming to you at the time you were notified you were through?

A. Six hundred three dollars and some odd cents, seventy-five cents, I believe.

Q. Seventy-five cents, would that be right?

A. I think that was it.

Q. Did you ever make a demand for that money?

A. Yes, more than a dozen different occasions.

Q. To whom did you make the demand?

A. Several times to Mr. Roscoe Thomas. I went finally to Colonel Witt. I went to Captain Leighton.

Q. Were these all officers of the Port of Embarkation? A. Yes.

Q. And what did they say to your demand?

A. They told me I shouldn't have been working.

Q. Did you ever get paid?

A. For this last?

Q. Yes. A. No.

Mr. Garland: I have no further questions.

Cross-Examination

By Mr. Belcher:

Q. Captain, at the time you first entered the employ of the United States Government, what process did you have to go through?

(Testimony of William P. Thornton.)

A. I had to be——

Q. Do you recall having had to make a written application? A. Yes.

Q. Do you recall having to take a physical examination? [16] A. Yes.

Q. Do you recall having been fingerprinted?

A. Yes.

Q. And where was all this done?

A. At the Port of Embarkation.

Q. In what office?

A. In the personnel division.

Q. Now, the 8th of May, 1942, was the first time you were hired? A. That is right.

Q. You served as First Mate on the Monarch?

A. That is true, Pacific Monarch.

Q. That service terminated on that ship June 15, 1942? A. Yes.

Q. Then you were Third Mate on the VMC, do you recall that, from June 23, 1942, to July 6, 1942?

A. Yes.

Q. Then you were Master of the Funston, were you not? A. Yes, sir.

Q. That was from July 7, 1942, to September 7, 1942? A. I believe that is the time.

Q. Then you were on the O'Hara as Master, were you not? A. Yes, sir. [17]

Q. From September 8, 1942, to October 4, 1942?

A. Yes.

(Testimony of William P. Thornton.)

Q. Then you were on the VMC again as First Mate? A. Yes.

Q. From October 5, 1942, to December 28, 1942, is that correct? A. Right.

Q. Then you were on the Teapa, were you not, as Master? A. Ask that again.

Q. Then you were on the Teapa, as Master?

A. Oh, the Teapa.

Q. You were Master of that ship from January 20, 1944, until November 25, 1944?

A. That is true.

Q. You were not employed between October 4, 1942, and December 28, 1942, until January, '44, a period of almost a year and a half?

A. I was on sick leave, I believe.

Q. Then after that, your next employment was as second officer on the Hoyle? A. Yes.

Q. That was from February 1, 1945, until April 12, 1945, isn't that correct?

A. I believe that is. [18]

Q. Then you were Master of the Hoyle from April 13, 1945, to June 28, 1945?

A. I believe that is right.

Q. Do you remember being Master of the Sierra?

A. No, I have never been Master of the Sierra, not to my knowledge.

Q. Were you on the Sierra as Master from June 29, 1945, to July 23, 1945?

A. I was pilot on the Sierra.

(Testimony of William P. Thornton.)

Q. Well, as pilot, you were Master of the ship, were you not?

A. No. The pilot is the pilot, the Master is the Master.

Q. Do you remember being on the FS 31?

A. Yes, sir.

Q. Were you Master of that ship?

A. I was.

Q. And that service was from July 24, 1945, to May 15, 1946?

A. I believe that is right. I am not certain of those exact figures, but it is close around there.

Q. Then you were Master of the Q 137, were you not? A. 137, yes.

Q. That was from June 6, 1946, to August 10, 1946, is that correct? [19]

A. Well, I just can't remember the exact dates, but, however, I was Master of the ship.

Q. Well, you did serve later as Master of the J 2139? A. Yes.

Q. And do you recall that was in the month of November, 1946?

A. I can't remember just the exact dates I have the discharges at all.

Q. Do you remember being Master of the J 299?

A. Yes.

Q. And that was in the year '46, wasn't it?

A. I believe so.

Q. Were you Master of the T 45?

A. No, not the C 45.

(Testimony of William P. Thornton.)

Q. On the T 45?

A. I was Master of one of those little fellows.

Q. That was during '47, you were on a ship in '47? A. Yes.

Q. Do you remember being pilot on the SF 210, in February—— A. No, I was not pilot.

Q. You applied for the position, didn't you?

A. I was never assigned to the 210.

Q. That position was offered to you, was it not? But you didn't accept it? [20]

A. Yes, it was.

Q. Do you remember why you didn't accept it?

A. No, I'll tell you, to go into detail, there is so many things happening on the 210 that——

Q. You didn't want to take orders from an Army captain, isn't that it?

A. I would have been glad to hold the position of pilot of the 210 under different conditions.

Q. You would have to take instructions from an Army captain?

A. That would make no difference to me. The Army captain that came there was a very wonderful young fellow.

Q. Had you not asked for the position on the 210?

A. No, that came to me by different other people.

Q. Isn't it a fact that you refused to take that ship?

A. I did under the conditions I said.

Q. Isn't it a fact that you wouldn't take the

(Testimony of William P. Thornton.)

position because the salary was lower than you had geen getting? A. That is not true.

Q. Then you asked for sick leave because of an injury to your shoulder? A. That is true.

Q. And you were granted that sick leave? [21]

A. I was.

Q. How long was that?

A. Well, it continued through until finally I was terminated. I came down and called on Mr. Miller on different occasions, and the last time I came to him I said, "Where are you going to put me?" "Well," he said, "I don't know. I have got to put you to work some place. I may have to send you down to Portland."

Q. At the time you were granted sick leave for the injury to your shoulder and arm, you went to the Marine Hospital, didn't you? A. Yes.

Q. You were discharged, weren't you, from the hospital as O. K.?

A. No, I was never discharged from there.

Q. Do you remember being offered the position of Master aboard different tugs that were being operated by the Army?

A. I was offered, yes, and at that time I said, "Not at this time."

Q. You wouldn't take it because it required 24 hours service, isn't that correct?

A. No, that isn't true. I said, "I don't care about taking that kind of a job at this time," but later on I told them I would take one of those jobs.

(Testimony of William P. Thornton.)

Q. Then you were granted an additional 15 days annual leave, were you not?

A. No, here is the way that was. I came down, as I said, to Mr. Miller, and he said, "I've got to put you to work." I says, "I'll tell you, my son is going to be married down in Dallas, Texas, and I would really like to make a trip down there, and if it is satisfactory with you I would like to have a little extra time off." He said, "All right, go ahead. I am leaving your permit open anyway, and come back and see me when you get back."

Q. You were terminated, were you not?

A. Well, I guess I was.

Q. Do you remember the date?

A. No, I don't say that I do.

Q. Would you say it was not the 9th day of May, 1947?

A. No, I wouldn't say that. I would have to look and see. In fact, I was told I was going to be terminated because I wasn't capable—I wouldn't say it was capable—"the ships that you have been on have been laid up and it is necessary to terminate you." I believe those were the words, I just can't recall it at this time.

Q. At the time you terminated your service on each one of the tugs or ships that I have mentioned between 1942 and 1946 or 1947, what process did you have to go through each time you took a new ship? Were you required to go [23] through personnel?

(Testimony of William P. Thornton.)

A. In the start—well, in the start you had to do that every time you changed a position. You had to be fingerprinted, but in the last part, you didn't have to.

Q. What last part?

A. That is in the start of the war, but after the war was over it was quite different. In fact, when I came out to Silverado and was made Assistant Marine Superintendent, to my knowledge, I wasn't fingerprinted at all.

Q. That is when you took this night Mate job?

A. Just told to go to another position.

Q. You didn't attempt to go through the personnel office at the time you took this job as night Mate, did you?

A. I came to the personnel and asked for Miller and he was out at that time. After waiting probably 20 minutes, I said, "I'll take a little walk out through the yard," and I met Miller in front of Pier 39 and I asked him for the night Mate's job. He said, "We don't handle that at all down here any more. That is all changed over." I says, "Who does it?" He said, "Colonel Jennings. In fact, Captain Leighton is the man you would have to see." I said, "All right, Harry is a friend of mine. I have known him for a long time. I will go and see him," and that is the way it turned out.

Q. As a matter of fact, at this time, you say Captain Jennings put you to work? [24]

A. No, Captain Jennings didn't.

(Testimony of William P. Thornton.)

Q. But he employed you? A. No.

Q. Who employed you?

A. I came to Captain Leighton and after talking with Captain Leighton, he sent me to George Merrill who was on the desk, the dispatcher, I would say.

Q. You knew you had to go through personnel, didn't you?

A. I did not. He told me it was all different, this was all changed, and they had nothing to do with it any more, and I don't know that a night Mate ever had to go through it.

Q. As a matter of fact, after you had been working on the Goucher Victory, didn't you meet Mr. Miller? A. Yes, sir.

Q. And you told him you were working nights on the Goucher Victory, didn't you?

A. I met Mr. Miller almost in the identical spot.

Q. That was only a day or two after you had gone to work?

A. No, no, that was on the 14th day of July.

Q. That was four days after?

A. No, I went on the 14th day of August. I mean, I went to work on the 10th day of July. [25]

Q. Didn't Mr. Miller tell you that you had no right to work on the Goucher Victory without going through personnel?

A. No, he didn't say I had no right to. He didn't use those words.

The Court: What date do you understand counsel

(Testimony of William P. Thornton.)

to be inquiring about? What date with reference to the commencement of your work on the 10th of July?

The Witness: I went to work on the Goucher Victory on the 10th of July, at 4:30 in the afternoon.

The Court: When did you have this conversation that is now being inquired about?

The Witness: That was on the 14th day of August at 8:00 a.m.

Q. It was during the month of May, however, that you were terminated, wasn't it?

A. Well, in some way my discharge was lost, at least I was told that. I was told when I was leaving that my discharge would be sent to me, which I never received.

Q. As a matter of fact, you did receive your discharge very shortly afterwards?

A. I did, about eight months later.

Q. You did receive your discharge papers shortly after you were terminated?

A. No, I never received the papers. [26]

Q. Isn't it a fact that you complained to the Marine Crewing Section office that you were not satisfied with the type of discharge you got?

A. With the type of what?

Q. The kind of discharge you got.

A. I didn't get any.

Q. Isn't it a fact that you wanted a discharge for disability?

(Testimony of William P. Thornton.)

A. When I returned from Dallas, Texas, I got a letter, I believe they have it in the files over there, and it said——

The Court: He is asking you one question and you are answering another question. He is asking you what you said, not what the fact was, but he is asking you what you then said the fact was about a certain subject. Read the question.

(Last question read by reporter.)

The Court: I will withdraw my explanation. Answer the question. Do you understand it?

The Witness: No.

The Court: Ask him another question.

Q. Do you not recall going to the dispensary with Mr. Miller where you were examined by a doctor, Captain Jesse L. Henderson of the Medical Corps? A. I was never——

Q. Just a moment. And didn't the doctor write a [27] letter dated May 9, 1947, to the Chief of the Marine Crewing Section while you were there to Mr. Roscoe Thomas, stating that Mr. Thornton was physically disabled and unfit to continue in the service as Master of Tugs?

A. Not to my knowledge, no. No, that is not true.

Q. Did you not get a discharge for disability?

A. There was a discharge for disability came several months later, and they told me it had some way been lost.

(Testimony of William P. Thornton.)

Q. You made a written application, did you not, on that date in May, 1947 for refund of retirement deductions?

A. That is not true. I never made application of that kind.

Q. Were you paid? A. Paid for what?

Q. Retirement deductions refunded to you?

A. Oh, yes. I received a retirement, yes. I received $1,400 and some odd dollars for social security.

The Court: When, do you know?

The Witness: I just can't recall the time.

The Court: With reference to the beginning or ending of your work in July or August you are here suing for?

The Witness: It was long after August.

The Court: State how much you got and what it was for, if you know? [28]

The Witness: When I went back to get the social security, I believe I got $1400. It was $1400, I know, but I can't say the balance.

The Court: Do you know what it was for, what kind of payment was it for?

The Witness: For money I had paid in social security.

Q. And your retirement pay, or your refund of what you had paid to the retirement fund, was up to and including April 15, 1947, two months prior to the time that you went to work on this tug?

A. No, that is not true.

(Testimony of William P. Thornton.)

The Court: At this point, we will take a five minute recess.

(Recess.)

Q. Captain, at the time in July, 1947 that you made the request for the job as night Mate, you knew, did you not, that there were two employees of the Army who had seniority over you?

A. Two?

Q. Yes. A. More than that.

Q. And the vacancy which occurred for night Mate on this ship should have been filled by men with greater seniority than yourself? [29]

A. No, I didn't know that and I don't believe that is true.

Q. Did you make known to either of the persons you have mentioned, Captain Leighton or George Merrill, that you had been terminated?

A. No, I didn't mention that. I didn't say that. In fact, here is what happened, when I asked Captain Leighton, he said, "Have you been terminated?" I said, "Well, I have never received a discharge, if I have."

Q. Who did you tell that to?

A. Harry Leighton, Captain Leighton, and he said, "Well, that can be fixed."

The Court: Repeat what you last said.

The Witness: "That can be fixed," and shall I continue with what I said?

The Court: Yes.

(Testimony of William P. Thornton.)

The Witness: And he said, "Go on and see Merrill, go out to Merrill and give Merrill your name and address," and Merrill put my name down and said, "Now, Captain, you live in Bremerton. Any long distance telephone calls, the Army does not pay it. You will have to pay it." I said, "That is all right, I will be glad to do that," and left the office. Then I was half way to the Administration Building when a messenger came after me and he said, "Mr. Merrill wants to see you." [30] I came back and Merrill said, "Will you go on the Goucher Victory?" I said, "Why, certainly. A ship is a ship with me." So he said, "Be down here at four o'clock on July 10," and I was.

Q. Did you not know from your previous service with the United States government that once you have been terminated, it is necessary for you to file a new application and go through the same procedure that you did?

A. I did not know that, no.

Q. You did not know that?

A. I was told by Mr. Miller that they have nothing to do with it in personnel, that it was all handled by—he said Colonel Jennings, first, and then he said, "Harry Leighton is the man you will have to see." On that word, I went to see Harry.

Q. Do you remember seeing Mr. John Miller on the 29th of July, 1947?

A. No, sir, that is not true.

(Testimony of William P. Thornton.)

Q. And having a conversation with him at that time?

A. On the 29th? No, sir, that is not true.

Q. And at that time, did he not tell you that you would not receive any pay for the services you rendered? A. That is not true.

Mr. Belcher: I think that is all. [31]

Redirect Examination

By Mr. Garland:

Q. Captain, when you were examined by a doctor in May, tell the Court what happened?

A. I will have to go back a little bit to see what leads up to it.

The Court: I think, Captain, that you should be able, one of your experience, to answer his question directly. And do not go back into a lot of explanation, because you might say a lot of things that are not material. If he wants you to say them, he will give you a chance to.

The Witness: I came to Mr. Miller's office. After talking a while, he gave me some papers and says, "Take them in to the doctor." There was a sealed envelope, and after sitting in the doctor's office a short time, the doctor took this sealed envelope and opened it, and says, "Now, Captain, what do you want?" I said, "I don't know." He read it over a while and finally signed something and put it in another envelope and give it to me to take back to Miller.

Q. Did you take it back to Miller?

(Testimony of William P. Thornton.)

A. I did.

Q. What conversation did you have with Miller?

A. I passed it to him, and he said, "Now, Captain, [32] these are your papers. I will mail those to you," and they never arrived. They haven't arrived yet, to my knowledge.

Q. Do you know what papers he was referring to?

A. Discharge papers or terminating papers. I guess.

Q. Did you ever go over to the Bureau and ask for your discharge papers? Did you ever go over to Merrill's office and ask for them?

A. I asked Mr. Thomas some time later.

Q. When was that?

A. That was probably six or seven months later.

Q. Later than August, 1947?

A. It was later than that.

Q. It was after August, 1947?

A. Yes, long after.

Q. Was it before you received a copy of your discharge papers?

A. It was, I would say, several months that I went to Mr. Thomas' office and asked him and he says, "We will send those to you, a copy," and I received a copy, I think it was something like several months.

Q. Were they able to find a copy at that time?

A. It was never found, to my knowledge. At one time, they wanted to see a copy and they looked

(Testimony of William P. Thornton.)

in my files, and my discharge, the one they said they had, had disappeared some place. [33]

Q. When was that with relation to the time you worked on the Goucher Vivtory?

A. That was way after I worked on the Goucher Victory.

Q. Was that before or after you received papers in the mail as to your discharge?

A. I received papers in the mail from Mr. Thomas several months, I believe you have it there when I received it.

Q. Here is what I am getting at, you went down and asked to see your discharge papers and they couldn't find them? A. That is true.

Q. Was that before or after you received a copy of them in the mail? A. That was before.

Q. But that was after you had worked on the Goucher Victory? A. Yes.

Q. Had you at any time up to the time you quit working on the Goucher Victory been notified that you were terminated? A. No.

Q. Were you informed, and did you believe that the type of work you were doing did not go through the personnel department?

A. I didn't know whether it was or not. A night Mate [34] is different than all others.

Q. Did you inquire of the man in charge of the personnel department about this night Mate job?

A. I went to the personnel, but Miller wasn't in,

(Testimony of William P. Thornton.)

but I met him later on in front of Pier 39 and that conversation went on.

Q. That was before you took the position?

A. No. Yes, that was before I took the position. That was on about the 5th or 6th of July.

Q. Did you sign the log book on the Goucher Victory?

A. Yes, sir. If I didn't, the man that relieved me did.

Q. You signed that each time you worked?

A. Yes.

Q. And that is in the possession——

A. That was on board the ship, of course, and the log book was left on board the ship.

Mr. Garland: That is all.

Recross Examination

By Mr. Belcher:

Q. Do you have your discharge papers with you? A. No, I haven't.

Q. Where are they?

A. The duplicate, I mean, that Mr. Thomas sent, I [35] believe is here.

Q. Well, I would like to see it. Produce it, please.

Mr. Garland: If Your Honor please, may the witness come down and pick out the paper?

The Court: The witness may step down and assist counsel in locating the paper.

(Discharge marked Plaintiff's Exhibit 1 for identification.)

(Testimony of William P. Thornton.)

Mr. Belcher: All I am interested in is the one document.

Mr. Garland: I have no objection.

The Court: Have you any objection to separating the one he wishes?

Mr. Garland: No, I haven't.

The Court: Does counsel have any objection to having all papers kept together and have them all marked together?

Mr. Belcher: The War Department notification of personnel action is the only one I care for.

The Court: Does counsel for plaintiff wish the whole matter to be kept together because it is all related or for any other reason?

Mr. Garland: It is all related, but there is no prejudice in putting it in as separate exhibits, so I have no objection to counsel's wish. [36]

The Court: Will the clerk take that paper away from the others and transfer to it the clerks' marks as to the exhibit in question, being Plaintiff's Exhibit 1, and delete from the other papers those marks and return the remaining papers to counsel for plaintiff.

Q. You are being handed a paper marked for identification as Plaintiff's Exhibit 1. Did you ever see that before? A. Yes.

Q. When did you get it?

A. I would say about seven months after I was on the Goucher Victory. If I am permitted to go ahead, I came down to Mr. Thomas' office and asked

(Testimony of William P. Thornton.)

him if I could have a copy of my discharge, that I have never received one, and he said, after looking, that it had disappeared. It was gone, they couldn't find it, it wasn't in my files.

The Court: Are you repeating his words now?

The Witness: No.

The Court: It is difficult for me to tell when you are speaking his words or your own. Try to make it clear. Those words spoken by you just now were words which you say he used, or words which you in his presence used?

The Witness: I came to Mr. Thomas' office, and asked him if I could have a copy of my discharge, that I had never received one.

Q. You knew at that time that you had been discharged, didn't you?

A. I had been told I had, yes.

Q. When were you first told?

The Court: Do you mean with reference to his alleged work period on the Goucher Victory?

Mr. Belcher: Yes.

Q. When were you first told that you were discharged for disability?

A. I was told something, but never had received——

The Court: He wants to know when you were told something.

Q. Would it be May 29, 1947?

A. I can't say that, no.

(Testimony of William P. Thornton.)

The Court: Can you say approximately when it was?

The Witness: When I received——

The Court: The notification, the information that you had been discharged. When did you first hear about it from anybody?

The Witness: There is something in there——

The Court: Will you let him have "something in there"?

Mr. Garland: Will you come down, please, and pick [38] it out?

The Court: Now, can you answer the question after seeing that paper? Read the question.

(Last question read by reporter.)

The Witness: No, it wouldn't be May 29th.

Q. Do you remember having gone to the doctor's office? A. Yes.

Q. Do you remember what date that was?

A. No, I don't.

Q. Would you say it wasn't May 29, 1947?

A. I wouldn't say for certain what day.

Q. What did you go there for?

A. With an envelope from Mr. Miller.

Q. Were you not told your purpose of going to see the doctor?

A. He told me that there was my discharge papers, yes.

Q. And that was on the 29th of May?

A. I couldn't say it was on the 29th. I think it was around the 12th or 13th.

(Testimony of William P. Thornton.)

Q. That was before you went to work on the Goucher Victory, wasn't it?

A. Yes, May 29th would be before I went to work.

Q. And the reason you went to the doctor's office was because you were not satisfied with the form of discharge you had received?

A. That is not true.

Q. Did you not yourself raise the question of having a discharge for disability rather than termination, ordinary termination? A. No.

Q. Who raised the question?

A. About being discharged for disability?

Q. Yes.

A. I was told by Mr. Miller and Mr. Andahl that I was going to be terminated.

Q. When was that? A. Well——

Q. In the month of April, wasn't it?

A. Some time in there, yes.

Q. Then you were terminated, weren't you?

A. I don't know. I don't know until later until this come—after going to Mr. Thomas to find out.

Q. Did you not yourself raise the question of the type of discharge you received? A. No.

Q. You did not?

A. I did raise about this piece of paper here.

Q. I am not concerned about that. [40]

A. I would like to have you read it.

The Court: I did not hear your last remark.

The Witness: I did complain about this.

(Testimony of William P. Thornton.)

The Court: Did you refer to Mr. Belcher in that statement, "I would like to have you read it?"

The Witness: Anybody, yes. This is the only one I could say.

Q. When was your arm injured?

A. You mean, when I went in to that doctor?

Q. The occasion when you went to the Marine Hospital.

A. I would say about the 20th of December.

Q. Of what year? A. 1947.

Q. Had you not had any——

Mr. Garland: If your Honor please, I believe the witness is mixed up as to years.

The Witness: What is that?

Mr. Garland: I believe you are mixed up as to your years.

The Court: I will try to have in mind that possibility, but you may bring that out.

Q. Can you explain why you did get a discharge for disability if you had not had any injury prior to the date of your discharge?

A. Ask that again. [41]

The Court: Read the question.

(Last question read by reporter.)

The Witness: This is getting me—there are so many angles I am getting at, I don't know how to answer them.

The Court: Read the question again.

(Last question read by reporter.)

The Witness: No.

(Testimony of William P. Thornton.)

The Court: I think this is produced by the witness misstating the year. That seems obvious, and why don't you act accordingly.

Mr. Belcher: Pardon me, Your Honor.

Q. Was it in December, 1946 that you got the arm injury?

A. That is when I had the injury. You mean when I struck the door of the ship?

Q. Whatever injury it was that you were finally discharged on account of disability.

A. If that is what it was, I think it was 1946.

Q. After you were first informed that you were going to be terminated, what was said to you?

A. What?

Q. What was said to you?

A. Did you say, "What does that do"?

Q. What was said to you? [42]

A. This was sent to me here.

Q. I understood you to say that you knew sometime in April, that somebody told you that you were going to be terminated?

A. 21 April, that is what it says right here, from John Miller.

Q. Did you not at that time make inquiry as to the type of discharge you were to get?

A. I said, "Well, what is the hurry about discharging me? I have leave time coming. Why not wait a little while?" I understood at that time that if you were in the service five years that you would have retirement pay coming in, so I told them, Mil-

(Testimony of William P. Thornton.)

ler and Emdahl both were there, and they said, "We'll let you stay until your five years is up."

Q. When would that be?

A. I went to work on May, 1942 and that would be May, 1949.

Q. 1947? A. 1947, I mean.

Q. And that was nearly two months before you went to work on the Goucher Victory, wasn't it?

A. Well, I went to work on the 10th of July.

Mr. Belcher: No further questions.

The Court: You may be excused.

(Witness excused.) [43]

The Court: Call the plaintiff's next witness.

Mr. Garland: We rest, Your Honor.

The Court: Does anyone offer this discharge?

Mr. Garland: I intended to offer it, yes Your Honor.

Mr. Belcher: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 1 received in evidence.)

Mr. Garland: If it is going to be admitted, I would like to put the witness back on the stand and identify the other papers with this exhibit.

The Court: That may be done, but you could have kept them together originally.

Mr. Garland: I thought it would save time.

(4-13-48 Letter marked Plaintiff's Exhibit 2 for identification.)

The Court: The Court will disregard the statement of counsel that plaintiff rests.

Mr. Belcher: No objection. [44]

WILLIAM P. THORNTON

Redirect Examination

(Continued)

By Mr. Garland:

Q. Showing you Plaintiff's Exhibit 2, was that a letter that you received the same time you received your discharge? A. No.

The Court: Is that the letter you received at the same time you received your discharge?

The Witness: Yes.

Mr. Garland: I offer Exhibit 2.

Mr. Belcher: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 2 received in evidence.)

(Application for Refund marked Defendant's Exhibit A-1.)

Recross-Examination

By Mr. Belcher:

Q. You are being handed a paper marked for identification as Defendant's Exhibit A-1. Do you see your signature on that? [45]

A. Yes, sir.

Q. That was filled out in full before you signed it, wasn't it?

A. This was filled out in full, just my signature, yes.

Mr. Belcher: I offer that in evidence.

Mr. Garland: No objection.

(Testimony of William P. Thornton.)

The Court: Admitted.

(Defendant's Exhibit A-1 received in evidence.)

Mr. Belcher: Nothing further.

Mr. Garland: Nothing further.

The Court: You may step down.

(Witness excused.)

Mr. Garland: Plaintiff rests.

The Court: Those connected with this case are excused until 2:00 o'clock this afternoon and may now retire. Court will be in recess until 2:00 o'clock this afternoon.

(At 12:00 o'clock p.m., Wednesday, June 22, 1949, proceedings recessed until 2:00 o'clock p.m., Wednesday, June 22, 1949.) [46]

June 22, 1949—2:00 o'Clock P.M.

The Court: In the case on trial, the defendant may now proceed.

Mr. Belcher: For the preservation of the record, if Your Honor please, we renew our motion to dismiss at this time for the reason and upon the ground that the testimony of the plaintiff himself clearly shows that he comes within the provisions of the exception under the Tucker Act, that he was an officer of the United States, and therefore our motion should be granted.

The Court: I feel more inclined to the course of reserving final ruling on this motion now than I did when it was made before. I have considered some

of these authorities and if counsel requests, the Court at the close of all the evidence will give further consideration to the matter. I will wish all the light that you can throw upon the question of whether or not this sort of an employee is within the meaning of the law an officer of the United States.

You may proceed. [47]

ROSCOE G. THOMAS

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Roscoe G. Thomas.

Q. You are a little hard of hearing?

A. A little bit.

The Court: Is he as hard of hearing as the other witness was?

Mr. Belcher: Not quite, but nearly.

The Witness: I believe, Your Honor, I can hear them all right.

Q. What is your occupation?

A. I am employed now as an employee relations assistant at the Seattle Port of Embarkation.

Q. And in July, 1947, what was your capacity?

A. At that time, I was the Chief of the Marine Crewing Section, which is the employment

(Testimony of Roscoe G. Thomas.)

office for Marine personnel at the Seattle Port of Embarkation.

Q. As such, I will ask you whether or not you were [48] the custodian of records of that department? A. Yes, sir.

Q. Do you know a John W. Miller?

A. Yes, sir.

Q. At that time; what was his occupation?

A. He was my assistant in charge of employing men in the deck department, especially, I believe.

Q. Will you explain to the Court the method of operation under the rules and regulations that have been established as to how employment is obtained through that section?

A. In order to obtain employment aboard the ships at the Seattle Port of Embarkation, it is necessary to submit an application and have a physical examination, be checked by the Intelligence and Security Division, and have fingerprints taken and fill out papers pertaining to income tax, and I believe there is some others which I have left out. There is a very lengthy routine a person has to go through to be employed.

Q. Each employee has a file that you call what?

A. We call it either the 201 or personnel file. One thing I omitted, a person has to take the oath of office and sign an anti-strike affidavit when he is employed.

Q. That is applicable to employees aboard ships, those vessels that were assigned to the Army?

(Testimony of Roscoe G. Thomas.)

A. Yes, sir.

Q. Do you have the 201 file covering the plaintiff in this case? A. Yes, sir.

Q. Do you have it with you?

A. I believe it is on that desk, sir. There are two of them there. One is his payroll file and one is his 201 file.

Q. For the purpose of refreshing your recollection, you may examine this file, which I understand was kept by you, under your supervision?

A. Yes.

Q. With reference to the employment record of the plaintiff in this case? A. Yes, sir.

Q. The employment record of Captain Thornton, William P. Thornton? A. Yes, sir.

Q. When was he first employed?

A. Well, it was in 1942.

Q. What time in 1942?

A. I believe it was the 8th of May, 1942.

Q. Does that show where he was employed?

A. Yes, sir. He was employed as First Mate, Transportation Corps, Seattle Port of Embarkation, Seattle, Washington, Army Transport Service, United States harbor boat, Pacific Monarch.

Q. When, if at all, was he discharged from that ship? A. On the 17th of June, 1942.

Q. What was his next employment?

A. June 23, 1942, employed as Third Officer, Quartermaster Corps, Ninth C. A., San Francisco,

(Testimony of Roscoe G. Thomas.)

California, Army Transport Service, Seattle, Washington, Vessel Manning Cadre.

Q. Is that commonly known as VMC?

A. Yes, sir, VMC.

Q. When was his next employment?

A. On July 7th, 1942, he was transferred and had a change of status to Master of the U.S.A.T. Funston.

Q. When was that terminated?

A. That was terminated by his transfer 8 September, 1942, to Master of the U.S.A.T. O'Hara.

Q. Then what was the next employment?

A. He was transferred and had a change of status in 29 December, 1942. I have left out one, sir. On September 5, 1942, he was transferred to First Officer on the Vessel Manning Cadre. Then the next one was the one I started to read. He was transferred to Third Officer on the Silverado, 29 December, 1942. [51]

Q. And after that?

A. 13 April, 1943, he was transferred as First Officer on the Vessel Manning Cadre.

Q. And that was on the same ship?

A. I beg your pardon?

Q. That was the same ship that he had been on?

A. No, he came from the Vessel Manning Cadre to the Silverado.

Q. Then the next one?

A. From there he went to Associate Marine Superintendent, CAF 11, 17 April, 1943.

(Testimony of Roscoe G. Thomas.)

Q. Then the next one?

A. The next one was to the training ship Sierra, 15 June, 1943, in the same capacity, but a different assignment.

Q. What is the next one?

A. The next was to Pilot of the Sierra, 16 June, 1943.

Q. What was the next?

A. Next is 1 October, 1943, First Officer at Large, Vessel Manning Cadre, Deck Department.

Q. What was the next?

A. That was part of the Water Division.

Q. And the next one?

A. The next one was a corrected action, corrected that one I just read, changing the date to 4 October, 1943. [52] On 4 October, 1943, he was transferred from Pilot on the Sierra to First Officer at Large in the Water Division, Safety and General Service Branch, Vessel Manning Cadre, Deck Department, sub-section.

Q. What was the next?

A. The next is 1 February, 1944. He was transferred to Master of the U.S.A.T. Teapa.

Q. And the next one?

A. The next is 16 February, 1944—I beg your pardon, that is a duplication. 1 February, 1945, transferred to Second Officer of the U.S.A.T. Hoyle.

Q. What was the next one?

(Testimony of Roscoe G. Thomas.)

A. 13 April, 1945. That is a duplication, too. 29 June, 1945, is the next change.

Q. Wasn't he made Master of the Hoyle on April 13, 1945?

A. On April 13, 1945, there was a reassignment action, changing him from Second Mate, salary $2818 per annum, to Second Mate, to serve as Ship's Master at the same salary, $2818.

Q. What was the next one?

A. The next, 29 June, 1945, when he was transferred and promoted to Master of U.S.A.T. Sierra.

Q. And following that?

A. 24 July, 1945, he was transferred and promoted to [53] Master of the U.S.A. vessel FS 31.

Q. Following that?

A. There seems to be one document left out here, because the next personnel action shows him being transferred from the Q 137, Chief Officer, to serve as a Master to the J 2139, Chief Officer.

Q. What date was that?

A. That is the 4th of November, 1946.

Q. Then what followed?

A. The next one is dated 7 December, 1946, transferred from the J 2139 to the J 299.

Q. Then what followed?

A. The next is the transfer January 22, 1947, from the J 299 to the T 45.

Q. Anything further?

A. There is a separation action for disability effective 15 April, 1947. At the time he was sepa-

(Testimony of Roscoe G. Thomas.)

rated, he was serving as Master of the T 45. Would you like me to read the remarks on that?

Q. No. Tell us in each one of these transfers, from one ship to another, did he have to deal through the personnel office? A. Yes, sir.

Q. What did he have to do?

A. As a matter of fact, as I remember it, he worked [54] in a personnel office for a short time. At one time the Water Division had a branch of their division in the same room where the personnel office was. We worked very closely together, as I remember it. He was working at one of those desks where men were appointed and transferred and promoted, and so forth and so on. In order to effect all of these actions that I read here, every time Mr. Thornton was transferred or promoted or changed from one ship to another, he reported to our office where the papers were made out and the appointment was made.

Q. Of your own personal knowledge, do you know whether or not Captain Thornton was familiar, thoroughly familiar, with the rules and regulations with respect to changes of position and original employment and discharge?

A. I can only say that I should think he would have been thoroughly familiar with it.

Q. Is anybody ever employed by the Army or by your Marine Crewing Section without passing through personnel?

A. Only in dire emergencies, when ships are overseas and it is necessary to put on an essential

(Testimony of Roscoe G. Thomas.)

crew member, somebody has gotten sick or something overseas, at out-ports occasionally, never in Seattle.

Q. You spoke of his being separated from the service? A. Yes, sir.

Q. What date was that? [55]

A. 9 May, 1947.

Q. What date was that effective?

A. That was the effective date. This document was prepared on the 28th of May, 1948.

Q. Tell the Court something about the preparation of that document you are just speaking of. A notice of separation, is it?

A. This document is the notification of personnel action. The date of the document is 28 May, 1948. It is addressed to William P. Thornton through the Superintendent of the Water Division, Seattle Port of Embarkation, nature of action, separation disability, effective date 9 May, 1947.

Q. How many copies of that are made?

A. I believe five copies are made.

Q. What becomes of them?

A. The original goes to the individual concerned, and then there are other copies for the payroll file, 201 file, the Civil Service. That is about five, I believe.

Q. In this instance, what date was Captain Thornton notified of his separation from the service.

(Testimony of Roscoe G. Thomas.)

A. As to this particular document in Captain Thornton's case, I couldn't say, but I can only say that the practice is to mail these out practically immediately after they are made.

The Court: Court is recessed five minutes. [56]

(Recess.)

Q. Before the recess, you examined the 201 file of Captain Thornton and you testified concerning the separation from service. I think you gave the date of May 28. Have you got your file with you?

A. No, sir, it isn't here now.

Q. Where is it?

A. I left it here, sir.

Q. What did you do with it?

A. I left it here.

Q. Is that the file you had before?

A. Yes, sir.

Q. Now, will you look at your file again? Do you understand the question?

A. Yes, sir.

Q. You testified that the date of separation was 28 May, 1947?

A. That was the date of the corrected separation.

Q. What was the date of separation?

A. The original separation document was prepared on the 15th of May, 1947, effective 15 April, 1947. That was subsequently corrected on the 28th of May, 1948, to show the effective date of separation as 9 May, 1947.

(Testimony of Roscoe G. Thomas.)

Q. You wrote a letter dated April 13, 1948, Plaintiff's Exhibit 2. Will you examine that, please? A. Yes, sir. [57]

Q. Does that refresh your recollection of the separation of Thornton from the service?

A. I don't quite get the question.

Q. In that letter do you not say, in effect, that a notice of separation was mailed about a year ago? A. Yes, sir, that is right.

Q. What is the date of the letter?

A. The date of the letter is 13 April, 1948.

Q. So that when you spoke of a year ago, you meant April, 1947? A. Yes.

Q. And is this Exhibit No. 1 which has been introduced in evidence a copy of what you refer to in your letter?

A. Yes, this is a copy of the personnel action which was prepared on 15 May, 1947, showing separation for disability.

Q. When was the copy prepared? That is not a duplicate original or anything of that kind, is it?

A. No, the original—I don't know. I did not actually mail the original myself, so I can't swear that the original was mailed.

Q. You said in that letter on the 13th that it was mailed a year ago?

A. That was the assumption, that it was mailed, because it is certainly always the practice to mail out [58] employees' copies of all personnel actions.

(Testimony of Roscoe G. Thomas.)

Q. Do you know where it was mailed to?

A. Where it was mailed to?

Q. Yes.

A. It was mailed to the same address, 935 Summit Avenue North, Bremerton, Washington, but I didn't type the letter so I can't——

Q. Let's not be technical. I am trying to get the information for the Court as to what transpired.

A. I am sure that this separation action, the original of it, was mailed to Captain Thornton, but I can't swear to that because I didn't actually do it myself.

Q. Did you have anything to do with the application that was filed by Captain Thornton for refund of retirement deductions?

A. Not directly, sir.

Q. Have you any such thing in his 201 file?

A. There was a copy of the retirement application. I believe that that has been taken out.

Q. Is that the one I took out of his file?

A. Yes.

Q. It is marked Defendant's Exhibit A-1. It constitutes part of his file, does it not?

A. Yes, sir.

Q. What is shown as the date of separation there? [59]

A. The ending date is the 15th of April. It is not very well typed here, sir. As a matter of fact, I can't read the year. It is the 15th of April.

Q. Do you know the year?

(Testimony of Roscoe G. Thomas.)

A. Yes, it was 1947.

Q. That is signed by Mr. Thornton, himself, is it not? A. Yes.

Q. And in making application to the pension board for refund of the retirement that he had paid in, he himself stated, did he not, that the date of separation was April 15, 1947?

A. Yes.

Mr. Belcher: You may examine.

Cross-Examination

By Mr. Garland:

Q. Was it necessary every time that Captain Thornton changed from one position to another that he again take his oath and again be fingerprinted and go through the same process each time he was changed from one ship to another?

A. No, sir.

Q. All these transfers and changes and so forth only required the one processing, isn't that right?

A. The transfer required the preparation of personnel [60] action.

Q. But as far as the employee himself is concerned, he goes through no more physical tests or any type of procedure other than would be noted by these transfers, isn't that right?

A. That is right.

Q. You spoke of the fact that he had to be fingerprinted and he had to take a non-strike oath and a few other things. That is the same oath that

(Testimony of Roscoe G. Thomas.)

is given to an ordinary and an able-bodied seaman that you hire, isn't that right?

A. Yes, sir.

Q. Was the process any different in hiring Captain Thornton, in so far as hiring personnel is concerned in your department than it would have been in hiring any seaman?

A. Not except that higher qualifications are required.

Q. In what way?

A. Qualifications such as licenses and so forth and so on, ability.

Q. If he was to be a Mate, a Master or First Officer. he was to have the necessary papers as provided by the different government bureaus to hold that position? A. That's right.

Q. What papers would a person need to hold the position of night Mate?

A. I believe at that time, he was required to have [61] Third Mate's papers.

Q. You did hire people at that time without any Mate's papers or even seaman's papers to act as night Mate, didn't you?

A. I couldn't say as to that.

Q. You have at times so hired people, have you not? A. I don't know.

Q. Was it customary in sending a notice of termination to a person who has terminated to also send along a letter of transmittal of some kind?

A. No, sir.

(Testimony of Roscoe G. Thomas.)

Q. Was there any record of mailing that went out of the office, to whom they went?

A. No, sir. The form is addressed to him and is put in an envelope and mailed.

Q. There is no office check on that except it is the custom of the business to do that?

A. That's right.

Q. Has there ever been any time that employees have been hired by the Marine Superintendent's Office? A. Not that I know of.

Q. Does that office have that power to hire employees? A. No.

Q. Were the night Mates processed the same as all other persons, so far as you know, who secured their positions? [62] A. Yes, sir.

The Court: What are the duties of night Mate? Is it anything like watchman on board a ship?

The Witness: A night Mate has more responsibility than a watchman. He is the relief officer of the ship and there are times when there is no other officer on the ship. At that time, he is in charge of the ship.

Q. Correct me if I am wrong. As I understand it, the regular day would work its eight hour shift, then they would all go home and leave somebody in charge of the ship and that would be the night Mate, is that right?

A. Not necessarily, it could be that way.

Q. Is that why the night Mate position was originated, so the other officers could be relieved?

(Testimony of Roscoe G. Thomas.)

A. So the other officers could be relieved, yes, sir.

Q. It was never contemplated that the night Mate would take command of the ship and run it out to sea or anything of that nature?

A. No, sir.

Q. And he had no charge of the loading and unloading of a ship or any say as to the ship's personnel or anything of that nature?

A. Some of these technical questions about night Mates I am not too familiar with. We have some other people you are going to call here, I believe, who can answer those [63] questions better than I can.

Q. I believe you got your years mixed up, but at one time in your testimony you stated there was a correction of discharge papers on the 28th day of May, 1948. Did you mean the 28th of May, 1947? Or was there something that took place on the discharge in May, 1948?

A. The date of the corrected action is the date that it was prepared, 28 May, 1948, that is a correction. This instrument, WD 50, that is the name of the personnel action.

Q. What was the nature of the error in the first action?

A. That is what I was going to read. This instrument, WD 50, dated 15 May, 1947, which showed the effective date 15 April, 1947 COB—close of business, that means—correction of ini-

(Testimony of Roscoe G. Thomas.)

tial separation necessary due to administrative error in fixing the effective date of separation.

Q. What department of the government is your personnel office under?

A. The Department of the Army.

Q. Is that in turn under the Secretary of War?

A. He was formerly called Secretary of War.

Q. At this time, was he called Secretary of War in 1947? A. I believe he was, yes.

Q. Do you know the mechanics by which that authority [64] of his was finally transmitted until it hired the stevedores who unloaded the ships? How was that worked?

A. I think we have some reference books here that would give that exactly, but I will try to——

Q. Are you familiar with it yourself?

A. I am familiar with it, yes, sir.

Q. Go ahead and explain what you actually know?

A. The Constitution of the United States delegates certain appointing authority to the President for hiring employees of the government and the President in turn delegates those powers to the different departments and the departments in turn delegate authority on down through the chain of command to the appointing officers in installations.

Q. You finally get down, I suppose, to the bottom where some stevedore has to unload the ship, is that right? He would be about the last one on the list?

(Testimony of Roscoe G. Thomas.)

A. The appointing officer—in cases we are talking about, Marine personnel, there is one appointing officer for all Marine personnel whether they are stevedores or captains of ships.

Q. Is his appointment signed by that officer?

A. Yes, sir.

Q. And you have the appointment of Captain Thornton there originally in his record? [65]

A. I imagine he has the original of it. There is a copy of the original appointment here signed by Wes L. Verd, Captain, Transportation Corps, Assistant Executive Officer, ATS, October, '42.

Q. Assistant what?

A. Assistant Executive Officer, ATS.

Q. Did it say what he is the executive officer of?

A. ATS, Army Transport Service.

Q. Is there anything there that shows it is a part of the regular Army or how its authority comes out of the Army?

A. Well, there is nothing in here that shows that.

Mr. Garland: With the Court's permission, perhaps if I explain what I am after, he can be able to answer me. For the purpose of this case, a person is or is not an officer, depending on two things: (1) the duty that he does, and (2) the line of his appointment. If his authority comes direct from the President, from the cabinet officer, he would be an officer for this purpose. A stevedore, I don't think, could possibly be an officer. I don't believe

(Testimony of Roscoe G. Thomas.)

a deck hand could, but on the other hand, we couldn't help but call an ambassador an officer.

Mr. Belcher: Is counsel arguing the case now, if Your Honor please?

Mr. Garland: I am just trying to [66] get an answer. If I am going too far, I would be glad to be stopped, but I am trying to get the point over to this man so I can get the mechanics.

The Court: I believe you should find out if the witness knows and then turn to some other witness if he does not.

Q. Do you know yourself how the authority is delegated to the Captain Verd who signed the appointment?

Mr. Belcher: My next witness is going to detail all of that, if Your Honor please.

Mr. Garland: I shall withdraw the question. That is all.

Mr. Belcher: I think the Court will take judicial notice of the fact that the Secretary of War is a cabinet officer who is appointed by the President.

Mr. Garland: Yes.

The Court: Both sides feeling that the Court should, I announce to you that the Court will.

The witness may be excused.

(Witness excused.)

RALPH JAY

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows: [67]

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Ralph Jay.

Q. Where do you live?

A. 2922 Alki Avenue, Seattle, Washington.

Q. What is your occupation?

A. Deputy Chief of civilian personnel for the Seattle Port of Embarkation, Seattle, Washington.

Q. And have been for how long a period of time?

A. Approximately February 1st, 1948.

Q. In 1947, what was your occupation?

A. I was Certifying Officer for the Seattle Port of Embarkation.

Q. As such, state whether or not it was your duty to certify Army payrolls?

A. Yes, sir, for all civilian employees, not the military.

(Time sheet marked Defendant's Exhibit A-2 for identification.)

Mr. Belcher: I ask the Court that I might withdraw the original and furnish certified copies of the payroll in this particular instance.

The Court: If the certified copy is a [68] photostat, that request will be granted upon condition that a white background photostat be furnished. Sometimes the Army particularly wants to furnish a

(Testimony of Ralph Jay.)

black background photostat and that will not be accepted by the Court as a substitute.

Q. In 1947, you say you were the certifying officer? A. Yes, sir.

The Court: In that connection, what is it you usually certified?

The Witness: Certified to the correctness of payrolls and payments made to civilian employees, purely salary and wages, no purchases of material.

Q. Mr. Jay, you have been handed some papers marked for identification as Defendant's Exhibit A-2?

A. I have A-2 only, sir.

Q. Can you state what they are?

A. This is the time sheet for night Mate and/or night engineer, Seattle Port of Embarkation. It is a certified true copy, I should say.

(Informal buck slip marked Defendant's Exhibit A-3 for identification.)

Q. Exhibit A-3, did you ever see that before?

A. I have, yes, sir.

Q. As the certifying officer, did you or did you not [69] certify those payrolls?

A. Covering these time sheets?

Q. Yes. A. I did not.

Q. You did not? A. No, sir.

Q. Why?

A. It would constitute an illegal payment.

Mr. Garland: I object to the answer as a con-

(Testimony of Ralph Jay.)

clusion of the witness. That is what this lawsuit is about.

Q. That was your reason for refusal?

The Court: He can state what his reasons were for not certifying, and you can inquire about the facts concerning his action in connection with that detail. The Court overrules the objection.

Q. How long have you been in government service? A. February 1st, 1944.

Q. Who is the cabinet officer in charge of the Army operations at the Port of Embarkation?

A. At this time, the Secretary of the Army.

Mr. Garland: I object to that. This witness is not qualified to answer questions concerning——

Mr. Belcher: I asked for the cabinet officer.

Mr. Garland: I still believe this is [70] not the correct way to prove who was a cabinet officer.

Q. The Secretary of War, was it?

A. At this time, it is the Secretary of the Army.

Q. I am talking about 1947?

A. The Secretary of War at that time, yes, sir.

The Court: The objection is overruled.

Q. Do you know anything about the delegation of authority by the Secretary of War, gleaned from any instructions or orders or Statutes or anything of that kind? A. To make appointments?

Q. Yes.

A. The original delegation, or the one in effect, was Order C, of 1946.

Q. Order C of June 6, 1946?

(Testimony of Ralph Jay.)

A. Yes, sir, and amended.

Q. Who was that order issued by?

A. Secretary of War. That was later amended by Order E, I believe, August of 1946.

Q. By whom was that signed?

A. The Secretary of War.

Q. To whom was the authority delegated?

Mr. Garland: I think the delegation would speak for itself and would be the best evidence.

Mr. Belcher: I do not have them here, Your Honor. I did not anticipate that. [71]

Q. How long would it take you to furnish those?

A. We can probably have them this evening. We could tomorrow.

The Court: The objection is sustained.

Q. Do you know generally how that authority is delegated?

Mr. Garland: Same objection.

The Court: That is sustained. You can ask him if he did anything pursuant to that authority, in execution thereof, himself, and you can ask him what he did.

Q. Will you have them with you tomorrow morning? A. Yes, sir.

Q. A white background certified copy of Order C of June 6, 1946, and Order E of August 2, 1946?

A. Yes, sir.

Mr. Belcher: That is the extent of our evidence for the purpose of showing that this man is an officer of the United States.

(Testimony of Ralph Jay.)

The Court: That is the plaintiff in this case?

Mr. Belcher: Yes, Your Honor. With the exception of the introduction of those two documents, the rest is covered by the law.

The Court: Do you wish to cross-examine as far as this witness has gone now? [72]

Mr. Garland: No. I will go further and stipulate that any certified copies of such orders may be introduced without further identification. We would like to move this to the Court and not have the witnesses come back.

Q. Will you also produce tomorrow morning a photostatic copy of the same type of circular, 25-35-16, dated November 7, 1947?

A. Yes, sir. Would it necessarily have to be a photostat? Can't we submit an original?

Q. The trouble is, we can't put your original in if it is your original record.

A. We may have available copies for the Court.

The Court: He was trying to explain that he might have a copy that was made otherwise than by a photostating machine.

Mr. Belcher: If that is satisfactory to the Court.

The Court: It is only where photostats are used that I made my remark previously.

Q. Instead of photostatic copies of these two other circulars and this third one you spoke of, will you have them certified as true copies?

A. These will be the action copies, the same as are furnished by the Secretary of War, the same as they are distributed.

(Testimony of Ralph Jay.)

The Court: I think counsel was [73] asking you to exercise caution to see that by proper authority there is a certification that the document you present is certified by proper authority to be a true and correct copy. I think counsel wanted to be sure it would not be subject to the objection that the copy is an unauthenticated copy that may or may not be official. I believe that is the caution counsel was asking you to apply.

Mr. Belcher: That is all.

The Court: You may examine.

Cross-Examination

By Mr. Garland:

Q. The Order C of 1946 and Order E of 1946 which came from the Secretary of War's office, which you have testified you will enter here tomorrow, are they the same orders that apply to the hiring of a seaman as to the hiring of Captain Thornton?

A. It is the delegation of authority from the office of the Secretary of War through the chain of command to the commander of the installation. In our particular case, it would be——

Q. It would be the same authority that allows you to hire your janitor as allows you to hire your sea captains?

A. To make appointments, to perform the duties of the [74] installation.

Q. Does that make your answer yes?

A. Will you repeat the question? I tried to

(Testimony of Ralph Jay.)

make it clear. The reason I qualified it is because Order C would apply to an inland installation where there would be no shipside employees. They give authority to the installation commander to make appointments and to delegate his authority.

Q. Are there any other orders that delegate any authority to the head of the department?

A. Not that I recall.

Q. So he hires his janitors under that same authority, as well as hiring sea captains under that authority? A. That is right.

Q. A sea captain is in common parlance called a civilian employee? A. Yes, sir.

Mr. Garland: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Belcher: The defendant rests.

The Court: Do you have any rebuttal with which you can go forward at this time?

Mr. Garland: I would like to ask counsel for the United States if they have the [75] ship's log here. I subpoenaed it, and I would like to get the Goucher Victory's log in to show he worked those times.

Mr. Belcher: There isn't any dispute about that. We have offered the payrolls to show it.

Mr. Garland: No further evidence.

Mr. Belcher: I want to offer the last two exhibits, A-2 and A-3.

Mr. Garland: I object to A-3 unless there is

stricken from A-3 that portion which says it is void, which would be a conclusion, could not be testified to, and could not come in a written instrument. It is self-serving, and that portion of it which says it is void should be stricken.

The Court: When was the objected to statement entered on the document? Has it been proved as to how it got on there?

Mr. Belcher: Yes. The witness testified he voided it as certifying officer.

The Court: Did he do it at the time in question when the work was done?

Mr. Belcher: That is my understanding. [76]

RALPH JAY

Redirect Examination
(Continued)

By Mr. Belcher:

Q. When did you put the word "void" on it?

A. At the time the time sheet was presented to the payroll office.

The Court: Approximately when was it with reference to the alleged doing by the plaintiff of the work for which he sues here?

The Witness: The work was performed, beginning 10 July through 31 July. They were the two time sheets which I voided. That was early in August, I would say the first few days of August, the first week. I can't remember exactly.

(Testimony of Ralph Jay.)

Q. At that time, they were submitted to you for certification?

A. Yes, sir. At the time they were submitted to me for payment, I voided them because the man had not been appointed.

Mr. Garland: If it is after the work was done, it is still self-serving as far as the government was concerned.

The Court: If it was part of his duty—do you admit he did it as part of this witness's [77] duty in connection with the payroll?

Mr. Garland: If he will so testify. I believe that is his testimony.

Q. Did you do that in performance of your usual duties as certifying officer? A. I did.

Q. And at the time the payrolls were submitted to you?

A. Immediately upon presentation to me.

The Court: The objection is overruled. Defendant's Exhibit A-2 and A-3 are admitted.

(Defendant's Exhibits A-2 and A-3 received in evidence.)

(Witness excused.)

Mr. Belcher: I just want to explain this so that there won't be any misunderstanding. Our motion to dismiss is based upon the fact that this suit was brought under the Tucker Act which distinctly provides that this Court is without jurisdiction of suits of a civil nature for salaries, wages, and commis-

sions, I think is the way it reads, of officers of the United States.

It looks rather inconsistent, perhaps, to show that the payrolls were voided and at the same [78] time claim that he was an officer of the United States, but that proof is offered merely for the purpose of showing why the demand which they plead was refused. I don't want to get this too confused. It is not an inconsistent position, as I see it, and for that reason I am not offering any evidence at all to show the things leading up to the employment or the alleged employment. The man worked, there is no question about that.

The Court: I understood there was to be some more evidence received here tomorrow.

Mr. Belcher: There will not be any further evidence unless counsel wants him back for cross-examination. I understood he waived that.

Mr. Garland: I waived the right to cross-examine.

The Court: What is the use of presenting evidence unless the Court is to consider it? I do not wish to make any ruling in the case until all the evidence is in.

Mr. Belcher: As I said, the pupose of that evidence is merely for the purpose of showing to Your Honor that this man is as we claim, if he was properly hired, an officer of the United States, and that this Court has no jurisdiction over this proceeding.

The Court: I will state in addition [79] that if the Court can be aided in determining this question

by that further evidence, the Court is not going to determine this question until the Court has the benefit of that further evidence. It may be that in your opinion that remark of the Court is not responsive. I do not see any such evidence before the Court yet as that which you claim is manifested in this further written data that you expect to present to the Court tomorrow.

Mr. Belcher: It comes then to a pure question of law, and the case turns upon the question as to whether or not this man is an officer of the United States.

The Court: The Court will have further hearings in this case tomorrow morning, and in the meantime, I ask all of you to consider whether or not this case is different from others, that where one may mistake his legal basis, but if his facts are the same and if the facts entitle him to any relief, whether he claims under the right law or not, is entitled to as much relief as if he had not said anything about the wrong law? The thing which the Court would be concerned with here is whether or not he is entitled on the facts proved to any relief under any law, whether he declared under the right law or not, unless he waives all rights [80] accruing to him under any and all laws except the one he has declared on. I ask you to consider all of those things as well as the point you make.

Mr. Belcher: I don't believe that is a matter of defense. Our motion is directed strictly to the jurisdictional question. It has embarrassed me con-

siderably to be forced to offer evidence here if the Court eventually determines that it does not have jurisdiction. The sole question in my mind is as to whether this Court is going to follow the Supreme Court of the United States and the Fifth Circuit and the Ninth Circuit in determining that the district courts do not have jurisdiction of suits of this type.

It leaves me in the position, Your Honor, where I can't in one breath claim this man is an officer of the United States for the purpose of this motion and then come in and show that he is not entitled to be paid because he was not properly appointed.

The Court: I will say this to both sides, and you may consider it until tomorrow morning. In this case, like any other, if there is any way under the law, any law by which this man can be paid for honest work done, the Court would certainly try to find some way of doing it if it is within the issues and within the proof. I do not mind saying that to you. Every man is [81] worthy of his hire and if there is any law, whether stated in the complaint or not, which would warrant on the facts proved here, the granting to this plaintiff of any relief, the Court would be rather inclined to grant such relief.

Mr. Belcher: It seems to me that is a question for the plaintiff and not the defendant.

The Court: I am making my remarks to both sides in the lawsuit. I am not confining my remarks to the defendant. I am addressing my remarks for the consideration of both sides, to the plaintiff for

whatever it is worth and to the defendant for whatever thought the defendant may wish to give to it with a view, if the Court feels that the point should not be well taken, to be better prepared to meet it by reason of the fact that you are being advised at this time and this far ahead of the final submission of the case, so that you can consider whatever answer there may be to the suggestion of the Court.

Mr. Belcher: In view of Your Honor's ruling, I think perhaps we had better put on other testimony.

The Court: I am not making a ruling. I am making a statement as to trends of thought, tentative thinking. I am not making a ruling. I am advising both sides we have certain proof here. The question is whether or [82] not this man is to go hence without any relief upon these facts merely because he may have declared under the wrong law. Can he not bring to his assistance on the facts proved whatever law those facts would entitle him to recover on, if there is any such law? If there is any such law, I would like to have it cited to me tomorrow morning. Other people on board Army Transport ships get paid for their services. Why may not one of the officer personnel get paid?

Mr. Belcher: That brings us to the question I just mentioned, if Your Honor please, in order to meet that situation I am going to have to put on testimony.

The Court: The AB's and the ordinary seamen and black gang, I suppose, other than the chief en-

gineer, get their pay on Army transports, whether they have the right to do so under the Tucker Act or not. There is probably some law by which they are entitled to obtain relief and payment for their services like other people. I do not know, but I suspect there is.

Court is adjourned until tomorrow morning at 9:30.

(At 4:45 o'clock p.m., Wednesday, June 22, 1949, proceedings adjourned until 9:30 o'clock a.m., Thursday, June 23, 1949.) [83]

June 23, 1949, 9:30 o'clock a.m.

The Court: I think counsel should be given an opportunity first to introduce the documentary evidence mentioned yesterday. After that is done, if there are some legal questions which you would like to discuss, we can discuss any legal questions that might be involved after that.

Mr. Belcher: Very well, Your Honor. Mr. Jay has stepped up to my office and I will send somebody for him. In the meantime, if I might, I will put one other witness on to save time.

The Court: I understood all you needed to produce for those documents yesterday was certified copies.

Mr. Belcher: That is correct.

The Court: Are they certified? Let opposing counsel see them and see if he wishes to object to the lack of authentication of them. This may be regarded as part of the defendant's case and the

defendant's case-in-chief is opened up for the purpose of introducing these documents.

As I understand, there is an implication that opposing counsel is not yet satisfied with [84] the proper authentication of the documents.

Mr. Garland: We are with two of the documents. He is going to identify the third one.

(Circular re personnel marked Defendant's Exhibit A-4 for identification.)

(Delegation of Authority marked Defendant's Exhibit A-5 for identification.)

The Court: Does counsel for defendant offer A-4 and A-5 at this time?

Mr. Belcher: I do, Your Honor.

Mr. Garland: No objection.

The Court: Each of them is admitted.

Is it possible that there may be anyone else other than Mr. Jay present who might know anything about this document that needs to be further authenticated, who had a business duty to keep aware of it and be advised of it and its proper authentication and that sort of information?

Mr. Belcher: Mr. Jay was the custodian of this, if Your Honor please, and the one who received it.

The Court: What is the reason for his absence?

Mr. Belcher: I sent him to the [85] library to bring down a book.

(Orders C marked Defendant's Exhibit A-6 for identification.)

The Court: There is one practice that is becoming more general in the modern practice, and that is where counsel opposed to a proposal in the trial of a case feels aware of the fact, even if he objects strenuously to a bit of evidence, whether it is oral or in writing, that he cannot prevail in his objection, it is getting to be more and more the practice in this and other courts to withhold any objection if you think you cannot prevail in it.

In that connection, I ask counsel to consider if you can successfully resist the introduction of this document. If you feel you can, then it is proper for you to maintain your objection, but if you feel you cannot resist it successfully, why suffer the delay?

Mr. Garland: I don't want to suffer the delay. No doubt it can be identified. I would just as soon let it go in subject to further identification.

The Court: Mr. Jay, will you resume the stand.

RALPH JAY

recalled as a witness by and on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. You are now being handed a paper marked for identification as Defendant's Exhibit A-6. Have you ever seen it before? A. Yes, sir.

Q. Where did you first see it?

(Testimony of Ralph Jay.)

A. I first saw this in Washington, D. C.

Q. And what is the document, without saying what it contains? A. It is Order C.

Q. Issued by whom?

A. Issued by the Secretary of War, Robert P. Patterson.

Q. Was that received at your office in the regular course of business as an order and was it acted upon by you as such? A. Yes, sir.

Mr. Belcher: I will now offer it.

Mr. Garland: No objection. [87]

The Court: Admitted.

(Defendant's Exhibit A-6 received in evidence.)

(Witness excused.)

Mr. Belcher: That is our case, Your Honor.

The Court: The defendant rests. Is there any rebuttal?

Mr. Garland: I would like leave of the Court to amend the complaint orally at this time by asking that there be included for jurisdiction of the Court Section——

The Court: May I make this suggestion, that you take a piece of scratch paper and write out the exact wording of the amendment that you wish to make, and then you can state at what place you wish the proposed amendment to be inserted in the complaint, if it is any place.

Mr. Garland: I move to amend paragraph 1 of the complaint in the cause of Thornton vs. United

States, No. 2046, by adding to the first paragraph, "Jurisdiction of the above Court is further invoked by Title 46, Chapter 22, Section——

The Court: Jurisdiction of the above named Court is——

Mr. Garland: ——further invoked by Title 46.

The Court: By and under?

Mr. Garland: By and under Title 46, Chapter 22, Section 781, USC.

The Court: Do you have that before you?

Mr. Garland: Yes.

The Court: What is the number of the page?

Mr. Garland: Page 511.

The Court: Is that in the bound volume?

Mr. Garland: That is in the bound volume of United States Code annotated.

Mr. Belcher: I object to the amendment. That relates to damages to vessels.

The Court: Is there any part of the Statute that relates to personal claims or breach of services to a vessel and the admiralty claims for payment for services rendered to a vessel?

Mr. Garland: The interpretation is that it relates to vessels, because of the note put in by the annotator. The case of Gentry vs. U. S., 73 F. Supp. 899, is a case where a seaman employed by the Army Transport Service of the United States sued to recover wages, and in that case they held that the Act applied and he could recover his wages under the Act.

The Court: Did it make any distinction as to

whether the jurisdiction invoked by [89] the suing party was on the admiralty or law side of the Court?

Mr. Garland: Yes. It was on the law side of the Court, and they allowed it to be amended into the admiralty side of the Court during the trial, very similar to the situation here.

The Court: You have not covered that point here. Do you think, if the Court permits this amendment to be made, this case should further proceed on the law side where it now is or on the admiralty side of the Court? If you have any thought on that, do you make any request in this amendment in connection with that question?

If you are suing in the state Court, this last question would not be of any moment, because the state Court has general jurisdiction. All you need to show to the state Court concerning its jurisdiction is that the plaintiff has a right against the defendant and you need a remedy. That is all you need to show to the state Court, but in this Court you are faced with a different problem. It is a Court of limited jurisdiction and you have to show affirmatively that the Court does have jurisdiction.

The Court does have jurisdiction in admiralty matters irrespective of diversity of citizenship. The Court has jurisdiction of law matters between private [90] individuals on the basis of diversity of citizenship, under certain conditions, and this Court has jurisdiction in actions involving the United States of America on the law side as well as the

admiralty side under some circumstances, but those circumstances should be pointed out.

In that connection, I ask counsel for plaintiff as well as counsel for defendant to look at the Statute relating to the jurisdiction of this Court and see if it expressly authorizes anybody to sue the United States of America on this kind of a claim on the law side of the court in this Court. I will not ask you to spend any time to determine whether or not on the admiralty side of the Court this Court may have jurisdiction, because that is too obvious to require further study.

Mr. Garland: The venue of the suit is under Section 782. "Such suit shall be brought in a District Court of the United States for the district in which the vessel or cargo charged with creating a liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then the District Court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the [91] United States."

The Court: That sounds like an action in rem to me, where instead of proceeding against the property, the Congress has consented that you sue the United States personally under that condition there stated in the Court meeting that condition. What about in personam actions against the United States?

Mr. Garland: I do not wish to waive any action that I have in law, and this case which I have quoted to Your Honor fits exactly on the facts presented here, where they considered both questions and they considered both questions of law and admiralty in both of the actions, and the man had apparently cited all the actions.

The Court: Where is the Statute that says this plaintiff may sue this defendant in this Court at Law?

Mr. Garland: Section 782 of Title 46, USC.

The Court: What does it say?

Mr. Garland: "Suits shall be brought in the District Court of the United States for the district in which the vessel or cargo——

The Court: I think that is venue, I do not think that is jurisdiction.

Mr. Garland: That is venue, that is correct.

The Court: Then you find the express provision in the Statute saying that this Court may entertain suits brought against the United States by anybody with a claim against the United States the same as in the state Courts an individual can sue any other individual.

Mr. Garland: Section 781, the previous one quoted, says a libel in personam——

The Court: That is not what you have. You have not an admiralty action. You have a law action here. You will probably find a provision somewhere else in that Statute. The Court will take a short recess.

(Recess.)

The Court: Have you anything else to say?

Mr. Garland: Yes, Your Honor.

The Court: This action was brought in 1948? That was before September 1, 1948, before this Title 28 USC went into effect.

Mr. Belcher: What was the section, Your Honor?

The Court: It is old Title 28 USCA, Section 41, Sub-section (20). One of the provisions is, that concurrent with the Court of Claims, the United States District Court—this is the effective provision, The United States District Court shall have jurisdiction "of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress . . . or upon any contract express or implied with the government of the United States." Do you contend [93] that that does or does not apply to this action?

Mr. Garland: I contend that it does apply to this action, but also I believe that concurrently with that section there is jurisdiction in this Court on its admiralty——

The Court: Yes, but this is not yet an action in admiralty.

Mr. Garland: I contend that it does apply, Your Honor.

The Court: There is another law that grows out of the embarkation by the government in the merchant shipping business by the operation of steam-

ships. There is a provision in connection with that law, as I recall, that under some circumstances authorizes suit against the United States or the shipping board, or at least the United States, and there are certain conditions in that law. As I recall, one of them is that a claim must be filed with the War Shipping Administration and you must wait a certain length of time until the War Shipping Administration has time to act on it. Then you have to allege what the result is with respect to the action taken by that administrative agency. I suppose, since you have not alleged that, perhaps there is some difficulty there. It is a little bit difficult for the Court to be put in the position of suggesting various acts of Congress under which relief might be had. Either the case should be discontinued or dismissed or amended or stopped or something so as to give counsel an opportunity to finally decide what they want to do.

Mr. Belcher: May I make this observation, if Your Honor please?

The Court: You may.

Mr. Belcher: The Seventy-ninth Congress, Second Session, 1946, enacted Public Law 600. I refer particularly to Sec. 12, contained at page 809 of Volume 60 of United States Statutes at Large, which reads, "The head of any department may delegate to subordinate officials (1) the power vested in him by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his department;

(2) the authority vested in him by Sec. 3683 of the Revised Statutes (31 USC 675) to direct the purchase of articles from contingent funds; . . ."

Sec. 71, Title 31, USCA reads as follows: "Public Accounts to be settled in General Accounting Office. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [95]

Sec. 71a. "(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such claim first accrued: Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established."

In that connection, under Title 28, Sec. 41 (20)——

The Court: Do you contend that Sub-section 20 is the Tucker Act?

Mr. Belcher: Yes, sir. In the case of Watson vs.

U. S., the Fifth Circuit, reported in 107 F. (2), p. 1, "Suit against the United States for return of amounts deducted from pay for Civil Service Retirement and Disability Fund, brought by one involuntarily separated from the Civil Service, complaint not alleging prior resort to the Civil Service Commission was properly dismissed for failure to allege exhaustion of the administrative remedies."

This man had a remedy, if Your Honor please. He [96] never was employed in the manner that the laws of the United States require. He was employed by the superintendent without proper authority after he had once been separated from the service. He has a legitimate claim. I don't think there is any doubt that the General Accounting Office would pay his claim under the circumstances, but the issues in this case were made up and we had absolute instructions from the Attorney General to raise this issue, and that is why we raised it.

The Court: I am going to make this general observation as a tentative observation. It is not the pronouncement of any law or ruling of the Court.

The inquiry that immediately arises in my mind in this connection is, was or was not this man employed to do ordinary maritime service on board a ship in maritime service undertaking? If he was, the question is, is there some law which limits his right to sue the United States, and if there is, why he may not proceed as any seaman would proceed in personam against his employer after he has ren-

dered services and his services have been accepted. That is the thing that immediately arises in my mind.

In a suit in admiralty for the recovery of wages against an individual employer, not the government of [97] the United States, you would have a lot of trouble showing to the Court that the admiralty court does not have jurisdiction to grant relief for services rendered to a ship in maritime service. We would naturally first be concerned to see if there is any Statute which prevents that same employee, if he is employed by the government through the shipping board or War Department to render services to a government merchant vessel in the merchant service or any other maritime service, from bringing the same kind of suit in admiralty.

Mr. Belcher: I don't think there would be. I think Your Honor is absolutely right.

The Court: That answer should be given apparently by the suing party and his counsel after mature reflection, and the Court is not going to put the suing party's counsel in the position of having to decide this very moment without further consideration how they are going to proceed here. I am going to suggest a continuance.

Mr. Belcher: His remedy, as pointed out in the Watson case, is to file his claim with the General Accounting Office and proceed in that. I don't have any doubt that when all the facts are known, he would be entitled to recover on quantum meruit.

The Court: The case will have to be continued

in [98] order to avoid the danger of the Court making a ruling to the prejudice of one side or the other without an opportunity of making a thorough consideration of the ruling before it is announced. I suggest to counsel there is only one thing to do in view of the present situation and that is to have the matter continued over at least 30 days, if not longer, to give both sides further opportunity to finally decide what position and course will be finally taken in the case.

Mr. Garland: I will make the motion to continue, Your Honor.

The Court: The Court will not act upon that trial amendment now which you request. You may request it at some other time and some proper time. If you decide amendments should be offered, you should make them before any trial date, which may now be fixed, arises.

Mr. Garland: We will do it on the regular motion date. Would it be proper, Your Honor, to continue this subject to call?

The Court: I want to continue it to August 9th for trial. That is conditioned upon the pleadings being settled before that time. I suggest you bring on any motion for amendment not later than the motion day on Monday, July 25th.

The Court will not be available to hear further proceedings in this case of any kind, those in the usual course or any that might be in the nature of an emergency, before the 7th of July.

All parties and their counsel and the witnesses are excused in this case until Tuesday, August 9th.

(At 10:35 o'clock a.m. Wednesday, June 23, 1949, trial proceedings adjourned until Tuesday, August 9, 1949.)

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter. [100]

Morning Session, Tuesday, August 9, 1949

The Court: Are the party and counsel ready to proceed with the further trial of Thorton versus the United States?

Mr. Belcher: There has been interposed a motion on behalf of respondents to dismiss, and in the event the motion should be denied, I would like to proceed with the trial with the permission to file an answer, which will be nothing more nor less than a general denial.

The Court: Unless there is some objection, you will have the right to do what you request. It may be understood, if you wish it to be so understood.

that should the case proceed to trial after the hearing of these exceptions or motions, that the United States of America is deemed to have filed or made an answer to the complaint or libel denying the material allegations thereof.

Mr. Belcher: That is correct.

Mr. Garland: No objection.

The Court: I'll hear you briefly on these exceptions to the libel in personam.

Mr. Belcher: There is only one, that the libel herein fails to state a cause of action in that a [101] specific allegation that the United States of America was the owner of the U. S. Army transport Victory, a public vessel on Puget Sound, and not a merchant vessel, the statute in such case being Title 46, Section 71 of the U. S. Code, providing in part: "A libel in personam may be brought against the United States, provided such vessel is employed as a merchant vessel."

I have filed and served a brief trial memorandum of my exceptions in which I quote the statute. The statute in full reads: "In cases where, if the vessel were privately owned or operated, and a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided, a libel in personam may be brought against the United States, provided that such vessel is employed as a merchant vessel. The libelant shall forthwith serve a copy of the libel on the United States Attorney and mail a copy of it thereafter by registered mail to the Attorney General of the United States."

The service in this case was made by the Marshal, and his return, if I understand it correctly, shows he is the *own* who mailed a copy to the Attorney General.

The first paragraph of the libel reads: "That upon information and belief at all times herein [102] mentioned the respondent, the United States of America, was the owner of the U. S. transport Victory, a vessel on Puget Sound, and not a public vessel."

It seems to me, if Your Honor please, that on the basis of the libel they have not brought themselves within the provisions of the suits in admiralty, and this court is without jurisdiction.

The Court: Mr. Belcher, did you find any cases supporting your statement in the last paragraph of your trial memorandum? Public Vessels Act is not applicable, because that Act by its terms applies only to suits in admiralty in suits for damages or for towage or for salvage services.

Mr. Belcher: That is Section 781, if Your Honor please, Title 46, and to answer Your Honor's question directly, I did not find any cases directly in point, although the statute itself seems to answer Your Honor's question, for this reason: A libel in personam in admiralty may be brought against the United States, or proceeding against the United States for damage caused by public vessels of the United States and for compensation for towage and salvage service, including contract salvage rendered to a public vessel of the United States, provided

that the cause of action arose after the 6th of April, 1920. [103]

It seems to me that limits the right of libel in personam for compensation for towage and salvage services, including contract salvage rendered to a public vessel of the United States.

The Court: What is a public vessel of the United States which is not a merchant vessel?

Mr. Belcher: This is a transport, an Army transport, if Your Honor please, and there are cases to the effect that even where an Army vessel in charge of the Army, transporting merchandise for the Army——

The Court: It may be that counsel didn't understand my words. What I am trying to give you an opportunity to state into the record and to advise the court about is this: What two classes of vessels —if there are two separate classes of vessels—are dealt with in these two separate statutes?

Mr. Belcher: The two separate statutes — the suits in admiralty applies to private vessels and makes public vessels liable to the same extent.

The Court: I understand there are two statutes: One, Section 742 of Title 46, and the other, 781.

Mr. Belcher: That is correct.

The Court: I am raising my voice only for the purpose of making myself understood by counsel, for no other reason.

Mr. Belcher: I understand.

The Court: I wish you would explain to me what your contention is as to what kind of vessels are

referred to in each of the statutes, if there are different kinds of vessels referred to in them.

Mr. Belcher: I think not. I think public vessels are vessels that are owned by the United States or in charge, or owned by a corporation of the United States, whereas the Suits in Admiralty Act is applicable to private vessels, and there is an exception made there that a public vessel may be held liable under certain circumstances.

The Court: What vessel owned by the United States may be attached with liability under Section 742, if any? Then, if there is any other kind of public vessel that may be attached with liability in Section 781, tell me what you contend may be the difference between those two classes of vessels.

Mr. Belcher: I contend that under Section 742 the vessel must be employed as a merchant vessel.

The Court: And it must be so alleged in the libel?

Mr. Belcher: Yes, Your Honor.

Now, in Section 781, which is the public [105] vessels act, it is strictly provided that that is limited to damages for compensation for towages and salvage services, including contract salvage rendered to a public vessel of the United States. There isn't any question that an Army transport is a public vessel.

The Court: Whether it is in the merchant service or not?

Mr. Belcher: Yes.

The Court: Might this second section that you

are dealing with, 781, refer to war vessels, battleships?

Mr. Belcher: I don't think so, no, Your Honor, nor would it apply to troop ships such as the Goucher Victory is.

I am basing my exceptions on the allegations of the libel, if Your Honor please.

The Court: I'll hear from opposing counsel, if he wishes to be heard on it.

Mr. Garland: If Your Honor please, I think our case rests entirely on Section 781 of Title 46.

The Court: Would you get me that statute, Section 781 of 46?

Mr. Garland: Would Your Honor care to look at my copy?

The Court: What is the nature of the cause [106] of action in which you seek to recover under and by virtue of the terms of Section 781?

Mr. Garland: It is a public vessel, not a Navy vessel, nor a merchant vessel. It is a public vessel. There were services rendered that vessel by this man as a seaman. The courts in interpreting that have not interpreted it as contended by the counsel of the United States, but have interpreted it as being in pari materia, Section 741 as applies to merchant vessels. Under that are two cases exactly in point, neither of which is binding on Your Honor or courts of equal jurisdiction. Mentell vs. United States, and also decided in the same case is Schmidt vs. United States, 74 Federal Supplement at page 754.

The Court: Are there any other citations of court decisions?

Mr. Garland: Yes.

The Court: Let me have all of them. I want to go get them.

Mr. Garland: Gentry vs. United States, 73 Federal Supplement, 899. Lauro vs. United States at 162 Federal Second, page 32.

The Court: Do you know what circuit decided the Lauro case?

Mr. Garland: That is Circuit Court of [107] Appeals, Federal Reporter, and it is cited again in the first case cited to you, Circuit Court of Appeals. I might say the last case is not exactly in point, but is a good discussion of the law.

The Court: Do you have any other case, other than these three that you wish the court to consider?

Mr. Garland: No, Your Honor, we do not.

The Court: You check these with me. 73 Federal Supplement, 899; 74 Federal Supplement, 754; 162 Federal Second, 32.

Mr. Garland: Correct, Your Honor.

The Court: Is there a syllabus under this statute, Section 781? Do you find any annotation, is another way to put it.

Mr. Garland: I did not look up the law from it in the U. S. Federal Code Annotated. I used a Federal Digest, and therefore I wouldn't know.

The Court: Have you a memorandum as to holding or ruling or facts in any one of the cases?

Mr. Garland: Yes. In the case of 74 Federal Supplement. I have it marked. 74 Federal Supplement, 754. The first syllabus is as put by the clerk in that case is: "Public Vessels Act. Suits in Admiralty must be read in pari materia. Public Vessels Act, Section 781. Suits in Admiralty. Section 741." [108] Both are under Title 46, U.S.C.A.

The Court: Can you pick up first a statement of the facts which called for the court's decision?

Mr. Garland: In this case a Mr. Schmidt was a marine engineer employed by the Government in a crew of a Y-95, a vessel operated by the United States.

Mr. Mandell was a member of a tug operated by the United States. The court said that both of them were public vessels and then discussed whether or not these persons who were suing for wages came under Section 741 and 781.

In that discussion the court said: "The Public Vessels Act provides that a libel in personam in admiralty may be brought against the United States for damages caused by a vessel of the United States."

The Court: Were they doing their work at the time, or tied up to the dock inactive or decommissioned or either? As I understand it, the contention of the Government is that this vessel on which the libelant worked, or is alleged to have worked, was tied up and not being operated as a merchant vessel at the time at all. The services were being performed while the vessel was in reality not at any

labor. Could it have been decided on account of the nature of the work the vessel was doing? [109]

Mr. Garland: The presumption is the vessel, I suppose — they were carrying out their regular duties. There is no discussion of that.

The Court: As I understand it, that is one of the points made by counsel. Do you so understand counsel's contention?

Mr. Garland: No, I do not to this point understand that to be one of counsel's contentions that this boat was tied up, and therefore working on it would be different than when the boat was at sea. I have not heard that put forth as an argument, except by Your Honor just now. We are ready to meet that, if they can point out the difference between a boat tied up and being maintained by a crew and a boat at sea. We will be ready to show where it is the same for this particular libel.

The Court: What do you understand the Latin phrase "Pari materia" to mean?

Mr. Garland: I think that it means that they are to be considered as the same law applying to different particles. I think they come from the same purpose, the same—well, from the same parts, the same maternal mother. That is my interpretation. They would be applied the same. One applies in one class of cases and one in the other; but the interpretation is the [110] same to cover everything.

The Court: Do you or do you not contend that each and both apply to the same set of facts?

Mr. Garland: I contend that 741 applies to a

vessel that would be called a merchant vessel, and 781 applies to a vessel that would be called a public vessel.

The Court: Not being used as a merchant vessel?

Mr. Garland: Not being used as a merchant vessel.

The Court: Does it apply to a vessel that is not commissioned, that is, decommissioned, or for one reason or other is not pursuing its usual trade or business or function, but merely tied up to the dock?

Mr. Garland: If that question arises I would say that it would. If the vessel is being maintained by a crew—I think Your Honor is under the apprehension that these vessels have been retired.

The Court: I don't think you should regard me as being under an apprehension. I'm trying to find out.

Mr. Garland: I contend we have no such vessel in this particular case.

Mr. Belcher: The evidence, Your Honor, of that has already been testified. This vessel was tied up to the dock and had been for some time.

Mr. Garland: There is no testimony that it is decommissioned.

Mr. Belcher: It was a transport, a troop transport.

The Court: Was it in the charge and keeping of a full crew, just the same as if it had been out at sea?

Mr. Garland: That is my understanding, that it was, that it had a full daytime crew; in other

words, to let the crew go at night they had hired a special crew to come on at night, and that special crew—one of them was called a night mate.

The Court: You take up each one of these cases, please, and let the court know how you apply that case to the facts here and what features there are about the decided case which you contend, if you do, entitles you to call to your assistance at this time the ruling of that case. You know, in the law books there are so many different cases and so many different situations that we can find a bare statement on almost any proposition. The question is, was it made and called for by facts that were then before the court which necessitated the court making such a statement?

Mr. Garland: The case of 74 Federal Supplement, 754, Mandell vs. United States, and Schmidt vs. United States is a case where seamen were suing under the Public Vessels Act, and it also cited 741, the Merchant Vessels Act. In discussing which act applied and if these seamen were brought under the act, the court on page 755——

The Court: What column and what syllabus?

Mr. Garland: The syllabus Nos. 1 through 4, all discussed at the same time, and it is the second paragraph on the right-hand column of said page.

The Court: I have it before me, the beginning of that paragraph.

Mr. Garland: Yes. I have that marked to put in the facts before Your Honor. Then that whole paragraph would have to be read to get the ruling

without taking it in line. I'd be glad to read it to Your Honor.

The Court: Where are the facts in the case that have been before the court stated?

Mr. Garland: I beg Your Honor's pardon?

The Court: Where in the report, the Mandell-Schmidt case do you find a statement of the facts then before the court in that case?

Mr. Garland: The statement of facts is in the introductory to the case before the discussion of the points of law under questions 1 to 4.

The Court: Where is that, now? Is it still in 1 to 4?

Mr. Garland: The statement of facts is not in 1 to 4. I have explained those to Your Honor. The statement of facts precedes that, stating that Schmidt was a member of the crew on one boat and that Mandell was of the crew of another boat, but that the question to be decided was the same. The Government moved to have the libel dismissed on much the same ground that the Government moves to have it dismissed here, that the Public Vessels Act and the Merchant Marine Act did not apply, and that was the question involved, that one of these acts did apply to a seaman on a public vessel.

The Court: Apparently the act involved, so far as Mandell is concerned was one for damages for wrongful death, was it not?

Mr. Garland: Yes.

The Court: Where does it speak as to Schmidt?

Mr. Garland: In the first paragraph under the

discussion of the case after the judge started to give his decision.

The Court: Schmidt became ill and inflicted with T.B. while in the service of the vessel and was [114] thereafter removed from her for hospitalization. This suit was instituted for the recovery of maintenance and cure and damages.

Mr. Garland: That is right.

The Court: It is not an action for——

Mr. Garland: Wages.

The Court: ——wages.

Mr. Garland: I was mistaken in that, Your Honor.

The Court: The government in both cases has filed exceptions to the libel and in the Mandell case has moved to dismiss. The chief legal issue in both actions is whether a member of a crew of a public vessel who is in the employ of the United States can maintain an action against the United States under the Public Vessels Act, Section 781. There is a factual question as to whether or not the vessels here involved are public or merchant vessels, and were the disposition of these cases to turn upon a determination of that issue I would hesitate to make a decision on the record as it now stands; however, that fact I feel is not controlling.

Libelant in both cases claims that the Public Vessels Act was intended to subject the Government to the same sort of liability growing out of [115] the activities of the Public Vessels Act as the Suits in Admiralty did concerning the merchant vessel.

Therefore, since a merchant seamen employed by the Government upon a merchant vessel can sue the United States under the latter act, it is argued that it does not change the result.

Mr. Garland: That is what the court so held, Your Honor, that we could bring suit under the Public Vessels Act the same as we could bring suit under the Merchant Marine Act.

The Court: In other words, you can treat the situation as if all the Public Vessels Act said was the same rule stated as to Merchant vessels being operated by the United States. No. Strike that. You can conclude that you have the same right to sue a public vessel of the United States no matter whether it was being operated as a merchant vessel or not. All you need to do is have a public vessel.

Mr. Garland: I'll go that far. That is right, irrespective of what is now said in the Public Vessels Act as to the cause of action or the activities of the vessel.

If you will notice, Your Honor, counsel is saying it is limited to these things where the act says for damage caused by the boat, and these things [116] which he puts on as a limitation, where, in fact, those things are meant to enlarge the Act, not to limit it. The word "and" is in there, not "only," these particular items which he intended to limit the Act to. Does Your Honor follow me there? You have the Act in front of you.

The Court: I follow the nature of your argument. See if you can find a place where the decision

is made. It is rather continuous and long drawn out. It is difficult to find the spot where the court decided to nail the point down.

Mr. Garland: On page 755 on the right-hand side of the page about the middle of the page it starts in a new sentence with the word "however."

The Court: There are a great many "howevers." I see that now.

Mr. Garland: "However, it is my belief the libelant's contentions are substantially correct that the Public Vessels Act in Suits in Admiralty must be read in pari materia and that the former was an attempt to equate the government's liability in operation of its merchant and public vessels."

The Court: Do you understand that sentence?

Mr. Garland: I believe, Your Honor——

The Court: Tell me what you think it means. I am not so sure.

Mr. Garland: It is my thought there that the court is putting the same liability on the Government whether they are operating a public vessel or a merchant vessel.

The Court: What does the word "equate" mean? Does it mean equalize?

Mr. Garland: In this particular——

The Court: Having the same application to the same state of facts?

Mr. Garland: Yes.

The Court: Doesn't make any difference which, and that word, taken with the Latin phrase "in pari materia" mean it doesn't make any difference

which act you sue under, that the Government is liable under either.

Mr. Garland: The Government——

The Court: The fact that Congress passed two different acts doesn't mean a thing?

Mr. Garland: It means it passed one act to take in certain situations and one to take in other situations; but the two acts take in all.

The Court: Does pari materia mean the same subject matter, the same scope, or what does it mean to you, if anything? [118]

Mr. Garland: I would state having the same purpose to be accomplished; it has the same ancestry. I don't believe it means the same material. I might be wrong in that, but I believe it means that it springs from the same purpose to be accomplished. I think to equate means to make an equal application in one act as in the other. I believe that is what the court so decided in that sentence.

The rest of the decision shows where it would not apply to members of the armed forces, and then it shows in Section 5 that cases that we are not concerned with would not apply; but we come under the ruling of that court.

The Court: Down further, the next to the last sentence in that paragraph in the right-hand column: "I feel that these suits," mean the Schmidt and Mandell suits then before the court, "would lie under the Suits in Admiralty Act" and those two men, as I understand, were members of the

crew of war vessels. Is that your understanding or do you have a different understanding?

Mr. Garland: They are not members of the armed forces, but members of a crew of a war vessel.

The Court: When hurt were those vessels operating in connection with war maneuvers or somewhere [119] in Italy—Italian waters?

Mr. Garland: I presume that is the fact, although that isn't in my opinion what the case is decided upon. It says one vessel hit a mine.

The Court: Where was the vessel and what was she doing when she hit a mine?

Mr. Garland: She was in the Mediterranean.

The Court: All right, Mediterranean, instead of Italian waters.

Mr. Garland: That is the same waters, Your Honor.

The Court: In what capacity do you think the persons Mandell and Schmidt were employed?

Mr. Garland: I think they were members of the crew.

The Court: Schmidt was a marine engineer employed by the Government as a member of the crew of the Y-95.

Mr. Garland: Yes.

The Court: The decedant Mandell was a member of the crew of a tug LT-21 employed by the United States, a member of the crew when the vessel hit a mine.

Mr. Garland: That is correct.

The Court: Doesn't say where the vessel [120] was when Schmidt became sick with T. B. Maybe one reason for not saying so is because it probably couldn't have been stated within a degree of plausibility where he was, because his illness may have been a gradual progress. We probably have a public vessel engaged in war activities or in activities connected with the servicing of naval wartime activity, and during that time in the Schmidt case the man was alleged to have fallen ill and therefore became entitled to maintenance and cure and for damages for having suffered tuberculosis. In the Mandell case it is alleged that the seaman—no, that the member of the crew on the war vessel got hurt in the course of his duties. Isn't that true?

Mr. Garland: That is true.

The Court: So we do not have a case of, one, like the libelant in this case being ashore, an employee, an ordinary employee that came from the shore to do daily work on a vessel that was not a merchant vessel, although it was a public vessel, was it not?

Mr. Garland: Yes, Your Honor. I believe the deciding thing, each one was a member of the crew. Our libel states this man was a member of the crew. There is a deciding factor, not that it takes in [121] foreign waters; not that one got T. B. and not that one lost his life. The deciding factor is that each was a member of a crew working on a public vessel and that this act was designed, ac-

cording to the *interpretation this* court, to protect persons who are members of a crew on a public vessel for damage done by that vessel.

The Court: You may proceed with your statement or argument as to why you think these exceptions should be overruled.

Mr. Garland: I have nothing further to offer, Your Honor, except the explanation that this man is a member of the crew of a public vessel; that under the wording and the interpretation of 46, United States Code, Paragraph 781, he is entitled to relief; that he has not been paid for his wages that were earned, and until today no denial was made that he had earned these wages; that the Government has consented to be sued, and that we should proceed with the presentation of facts here at this time.

The case of Gentry vs. United States, which I have quoted Your Honor, 73 Federal Supplement, is a case where a seaman was suing for wages and that was under 741.

The Court: Or 2? Was it 1 or 2? [122]

Mr. Garland: I thought they sued under 741. They sued under 741, the Merchant Vessel Act, and the court said, "If you will go and come back under 781, your relief will be well asked for." That case is decided by paragraph 9, the very last paragraph in the case as it appears on page 903. That is a person suing for wages who was working in the Army transport service, the same as this person was working for the Army transport service. The

court says: "Since the libel invokes the jurisdiction of this court under Suits In Admiralty, Section 741 and following, and it appears that the vessels involved were public vessels of the United States not employed as Merchant Vessels, respondent's exceptions will be sustained with leave to libelant to amend pursuant to local rule 129 so as to invoke jurisdiction under Public Vessels Act 781" and that is how we proceed, Your Honor.

If you review the pleadings, we also asked for permission to amend and did come back under Section 781.

The Court: Were you suing in admiralty previously?

Mr. Garland: No, Your Honor, we were not suing in admiralty. We were invoking the public liability act in the law cited the court. As Your [123] Honor suggested under that section we also found cases to sustain our proposition. At least, the wording of them did, but we are at this time satisfied to rest on the admiralty side of the court.

The Court: I understand there is something more than that. The meat in the coconut is that you claim now to be suing under Section 781.

Mr. Garland: That is correct.

The Court: Now, then, I have looked at those two decisions and now wish to consider the 162.

Mr. Garland: That case only dicta supports our proposition, but it is a case of appeals of the Court of Appeals.

The Court: Where is the dicta?

Mr. Garland: On page 35.

The Court: One paragraph that has a 10 within a bracket?

Mr. Garland: It is above that, Your Honor, as you will see some citations in the middle of the paragraph above that, and it starts out: "The Western Maid—" and so forth. It is true, it allows recovery by suits in admiralty by officers and members of the crew.

The Court: Wait a minute. Just a moment. I don't see those words. [124]

Mr. Garland: Let us stop at the top of the paragraph. It will be better to understand those words.

"Libelant claims that proof of Italian law is unnecessary——"

The dicta in that case is that they recognize these cases from the Circuit Courts as being correctly—correctly stating the law that an officer or seaman can bring action under the Public Liability Act No. 781.

I have nothing further.

The Court: The court overrules the exceptions.

Mr. Belcher: May I make this observation?

The Court: I have no objection to your doing so, Mr. Belcher, if you will not consider this practice as precedent in future cases. You may proceed.

Mr. Belcher: I want to call Your Honor's attention to the fact that in the 73 Federal Supple-

ment decided by Judge Mathias there was a written contract involved in that case.

The Court: I don't know what case you are referring to.

Mr. Belcher: I am referring to the case of Gentry vs. United States. Libelant, formerly an employee of the United States of America, by and through [125] the Army transport service filed this action for allegedly unpaid wages and bonus.

The Court: Suppose that the court thought in this case that the plaintiff was entitled to prove that although he may not have had a written contract he had an oral contract with somebody which was disputed by the Government, but nevertheless the Government permitted the libelant to go to work and continue working and received his services? A libelant has a right to have the court decide as to whether or not that would not take the place of a written contract creating the status of employer and employee.

The ruling announced overruling the exceptions will stand.

Mr. Belcher: Your Honor will allow an exception.

The Court: Allowed.

At this time we will take a brief recess, after which we will proceed with this trial.

(Recess.)

Mr. Garland: There has been considerable evidence taken by the plaintiff, and I would like to

move at this time that the court consider that evidence as part of this amended libel. [126]

The Court: Any objection?

Mr. Belcher: No objection.

The Court: It is so ordered. The court will do that. Do not cover that ground or any part of that ground in the testimony, if any is received later.

Mr. Garland: The plaintiff at this time rests, Your Honor.

GEORGE MERRILL

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name, please?

A. George Merrill.

Q. What is your occupation?

A. I am occupied as a marine superintendent, Seattle Port of Embarkation.

Q. You have been for how long?

A. The past three years. I am wrong on my dates there.

Q. Were you marine superintendent at the time the Goucher Victory was berthed in Seattle?

A. Yes, sir.

The Court: Will you spell your last name [127] for my convenience?

The Witness (Spelling): M-e-r-r-i-l-l.

The Court: And the first name and initial?

(Testimony of George Merrill.)

The Witness: George N.

The Court: You may resume the examination.

Q. What are the duties of marine superintendent?

A. The duties of marine superintendent. At the present time our duties—my duties are to inspect vessels, act as liaison with the Coast Guard on Coast Guard regulations.

Q. Were those your duties in the month of July, 1947?

A. No, sir. I was employed as a dispatcher, marine superintendent dispatcher.

Q. But you are in the office of the marine superintendent at the time?

A. That is correct, sir.

Q. What was your duty at that time?

A. At that time I was dispatcher. I would set up vessels for sailing, arrange with different outside agencies for services necessary for the vessels such as quarantine and public health, immigration customs and——

Q. Did you have anything to do with the keeping of the deck log?

A. Yes, sir. I would make entry on the arrival and departures of all shifts in the port area on any shift.

Q. Have you in the deck log covering the Goucher Victory [128] an entry——

A. May I correct you? This is not a deck log; it is an office log of the marine superintendent.

(Testimony of George Merrill.)

Q. All right, an office log.

A. I have this log before me, yes, sir.

Q. In Coast Guard parlance that is the deck, isn't it? A. Sir?

Q. Isn't the office the deck?

A. The office, the deck?

Q. Yes.

A. I might term it that way in nautical terms.

Q. It is the office? A. Yes.

Q. That was kept either by you or under your supervision and direction; isn't that correct?

A. It was kept by me and other marine superintendents during their shift.

Q. Have you before you the office log covering the Goucher Victory?

A. Yes, sir, I have.

Q. The year, 1947? A. Yes, sir.

Q. What type of ship was the Victory?

A. A victory ship, EC 2 type, classified with the Maritime Commission. She was employed by the Army as [129] a troop transport. Her holds were fitted out with berths and bunks for the troops.

Q. When was that conversion made?

A. I can't answer that question. The conversion was probably made——

Q. When did the ship first come into port?

A. The ship first arrived in Seattle about April of 1947. She was transferred from San Francisco Port of Embarkation.

(Testimony of George Merrill.)

Q. At that time what was she, a troop ship?

A. She was a troop carrier, yes, sir.

The Court: Beginning when?

The Witness: I do not know the date that she was——

The Court: The approximate date.

The Witness: She was signed to the Seattle Port of Embarkation April, 1947.

Q. When did she arrive in Seattle?

A. She arrived Seattle——

Q. You may consult your log.

A. ——the 10th—On this particular voyage she returned to Seattle on the 10th of July, 1947.

Q. 10th of July, 1947. In other words, she first was assigned to you in April, but didn't arrive until July; is that correct? [130]

A. I'd have to check back through the log for that.

Q. Would you do that, please?

A. No, she had made a voyage into Seattle before that, arriving on the 11th of March, 1947.

Q. As a troop ship?

A. As a troop ship, sir.

Mr. Garland: Your Honor, I don't believe that is material. I'll concede the ship might or might not have been in Seattle before April, 1947, and object to it as immaterial and a waste of time.

The Court: Try to avoid unnecessary proof, if that suffices. Act accordingly. If it does not, will you kindly indicate your attitude.

(Testimony of George Merrill.)

Mr. Garland: I object. It is immaterial whether the ship was here before April of 1947 or not.

The Court: I referred to respondent's counsel in my last remark.

Mr. Belcher: Counsel concedes that this was a troop ship and she was berthed in Seattle during the month of July. That is all I need.

Mr. Garland: We have so testified already, so we concede it.

Mr. Belcher: Let's understand, now, that during the entire month of July, and how about August?

The Court: Is the month of August material to this action?

Mr. Belcher: Yes.

The Court: Is there any objection to stipulate —having the first stated stipulation between counsel apply to all times material to this action?

Mr. Belcher: That is correct.

Mr. Garland: That is correct—so stipulated.

The Court: Proceed.

Q. When did the Victory Goucher—Goucher Victory finally leave here, if at all?

A. During this voyage she departed on the 29th of August, 1947.

Q. Now, while the Victory Goucher was in the Port of Seattle—Port of Embarkation, did she carry a full crew?

A. She was not fully manned. She had her assigned crew, but not fully manned.

(Testimony of George Merrill.)

Q. Not fully manned? A. Yes, sir.

Q. She was berthed where?

A. She was at numerous berths during her stay in port on this voyage. She was shifted on the 11th of July. She shifted to anchor in the stream on the 15th of July [132] and she was shifted to pier 37 south outer.

The Court: Just a moment. July 15, shifted to what pier?

The Witness: Pier 37 south outer.

The Court: Pier 37.

Q. What time of the day?

A. She arrived on berth at 0841 in the morning, sir.

The Court: What time of day is that in ordinary parlance?

The Witness: That is 8:41.

The Court: 8:41 a.m.?

The Witness: Yes, sir.

The Court: Next, if there is a next.

A. On the 12th of July the vessel was shifted.

The Court: You mean the 12th, now? You have already passed the 12th.

The Witness: Pardon me, sir.

A. The 17th of July.

Q. 17th?

A. From Pier 37 to Pier 38 north outer.

Q. 37? 38. What hour of the day?

A. The movement started at 1212 and was completed at 1305. 1:05 p.m.

(Testimony of George Merrill.)

Q. 1505? A. 1305. [133]

Q. A.M.? A. P.M.

The Court: Next?

A. On the 28th of July the vessel shifted from Pier 38 north outer to Pier 65.

Q. What time? A. 1755, 5:55 p.m.

Q. All right.

A. On the 13th of August the vessel shifted from Pier 65 to Pier 36, outer berth.

Q. What time?

A. 0755, 7:55 a.m. On the 15th of August the vessel shifted from Pier 36 outer berth to Pier 38 north outer berth. The shift started at 1240, 12:40 p.m., and was completed at 1315, 1:15 p.m. On the 29th of August the vessel sailed from pier 38 north outer at 0608. That is 6:08 a.m.

The Court: Departed for the open sea or other port?

The Witness: Departed for San Francisco, sir.

The Court: What time was that?

The Witness: That is 6:08 a.m., sir.

The Court: You may inquire.

Q. What was the cause of these various shiftings?

A. Due to the fact of arrivals and departures of vessels [134] in the port. We have nine berths, and at different times we have more vessels than what we can handle on berths.

The Court: During that time might she properly be said to have been operated as a troop ship,

(Testimony of George Merrill.)

even though she didn't have any troops aboard?

The Witness: Yes, sir.

The Court: She hadn't been decommissioned and still kept in readiness for future work of that sort?

The Witness: That is true.

The Court: Proceed.

Mr. Belcher: That is all.

The Court: Any cross-examination?

Mr. Garland: No questions.

The Court: Step down. Call the next witness.

PALVIN AMDAHL

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name.

A. Palvin Amdahl. [135]

Q. Mr. Amdahl, where do you live?

A. I live at 2229½ Minor Avenue North.

Q. Seattle?

A. Seattle, Washington.

Q. What is your occupation?

A. At the present time I am assistant chief, Utilization Section, Seattle Port of Embarkation.

Q. What was your occupation during the months of July and August of 1947?

A. I was assistant to Mr. Thomas, chief of marine crew section.

(Testimony of Palvin Amdahl.)

Q. Did you have anything to do with the personnel office at that time?

A. Yes, I did.

Q. Are you acquainted with the libelant in this case, Mr. William P. Thornton? A. I am.

Q. And do you have the records of the personnel office of the Port of Embarkation with you?

A. Yes, I do.

Q. Will you examine them, please, for the purpose of telling us when, if at any time, Mr. Thornton was employed prior to 1947 and in what capacity?

A. Mr. Thornton was first employed as first mate on 8 May, 1942, was assigned to the U. S. H. B. Pacific [136] Monarch.

Q. What type of vessel was that?

A. I am not in Operations, but I believe the vessel was a small type steam coal burning steam vessel, but not of a transport class.

Q. A cargo vessel?

A. It was in a towboat class, large towboat class.

Mr. Garland: If Your Honor please, I know that there was twenty separate positions that he held, and I know we will be here all day if we take this much time on each one of them. I therefore object to 1942 as being too remote and immaterial to the cause of this action.

Mr. Belcher: I challenge that statement, if Your Honor please, because it goes to the very question

(Testimony of Palvin Amdahl.)

as to whether this man knew what the regulations were with respect to reemployment rights.

The Court: Can you stipulate that this man was qualified respecting his knowledge of such matters?

Mr. Garland: No.

The Court: Very well, then, you may proceed as briefly as you can.

Q. Mr. Ahdahl, just briefly state what other employment—Was he continuously employed in that or a similar capacity by the United States Army? [137]

The Court: You mean the libelant?

Mr. Belcher: Yes, Your Honor.

The Court: For how long, to your knowledge was the libelant employed around ships that were operated by the United States Government in any capacity, if you know?

The Witness: Well, according to the record he was employed continuously until 9 May, 1947.

Q. What happened on that day?

A. Mr. Thornton was separated for disability.

The Court: That was on May what?

The Witness: 9 May, '47.

Q. When a man is separated on account of disability what is done by the personnel office?

A. The employee is called in. He is given a physical examination. He'd be instructed in his rights and privileges regarding his separation and at that time would have to make a decision whether

(Testimony of Palvin Amdahl.)

he wished to submit himself to take a physical examination for physical disability.

Q. Is there such a thing as annual leave in the Army service? A. Yes, sir.

Q. Have you any records from which you can testify as to the approved annual leave, if any, that accrued, that [138] was due Mr.——the libelant at the time of his separation on May 9, 1947?

A. Mr. Thornton had accrued leave to his credit covering 29 and six-eighths days.

The Court. 29 and what?

The Witness: Six-eighths of a day, or sufficient leave to cover him from 9 May, 1947 through 6 hours on 14 June, '47.

The Court: June what?

The Witness: 14th.

Q. In each of the instances where the libelant, William Thornton, had changed his position, if he did, what was it necessary for him to do?

A. It was necessary for him to report to personnel office and receive an appointing document changing his assignment.

Q. Did he do that in each of the several occupations that he filled from May 8, 1942 to May 9, 1947?

A. I wasn't in the personnel office for that entire period. However, it would be reasonable to state that he would have had to come to personnel office on many of the occasions to obtain his standard form 50. There may have been exceptions

(Testimony of Palvin Amdahl.)

whereby the paper may have been processed for him; but in any event, he would have received a copy of any action appointing him to the [139] position.

Q. Would that occur on the transfer to each separate ship? A. Yes, sir.

Q. What process was it necessary for Mr. Thornton to go through after he had been discharged or laid off or whatever you might call it, on May 9—separated from service on May 9th, 1947 before he could be legally employed?

A. He would have had to make application for Federal Employment. That application would have had to have been accepted. The employee would have to have been interviewed and approved for the position.

Q. To whom would he file that application?

A. He'd file that with the personnel office.

Q. Was there such from the record filed by him?

A. Not to my knowledge.

Q. Is there any record in the personnel office of the libelant William Thornton having made a written application for reemployment than having gone through the process of physical examination?

A. No record, no.

Q. Finger printing and so forth prior to July 10, 1947, after his separation?

A. No record.

Q. Is it customary for the Army to put civilian employees [140] to work on vessels unless they have

(Testimony of Palvin Amdahl.)

fully complied with the civil service requirements?

A. No, sir.

Q. In this case did Mr. Thornton comply with any of the civil service requirements prior to June 10, after he had been separated from his service on May 9, 1947?

A. He never complied with any of the personnel processing for appointment as required by the regulations.

Q. Has anybody in the armed forces—in the Army at the Port of Embarkation authority to employ anybody except in the manner that you have testified? A. No, sir.

Mr. Belcher: You may inquire.

The Court: You may cross-examine.

Mr. Garland: Very well, Your Honor.

No questions of this witness.

The Court: Step down. Call the respondent's next witness.

RALPH JAY

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q State your name, please? [141]

A. Ralph Jay.

Q. What is your occupation?

A. Deputy Chief of Civilian Personnel, Seattle Port of Embarkation.

(Testimony of Ralph Jay.)

Q. In 1947 what was your occupation in the month of July and August?

A. Certifying officer, Seattle Port of Embarkation.

Q. What do you mean by certifying officer?

A. Paymaster.

Q. I think at the previous hearing you testified concerning exhibits in evidence which I now offer again in this case, certain payrolls, I think, in that case A-1 and A-2—Exhibits A-1 and A-2.

Mr. Belcher: Which I now ask to be handed to the witness. There are three of them, A-1, A-2, and 3.

The Court: I understand that the libelant effected an application to this part of the trial all of the testimony previously introduced on behalf of the plaintiff and libelant. Does the respondent wish to accomplish the same results?

Mr. Belcher: Yes, I'll do the same and supplement it.

The Court: Any objection?

Mr. Garland: No objection. [142]

The Court: It is so ordered. All the testimony produced on behalf of the defendant or libelant at the previous trial proceedings in this case is now regarded as received in evidence and already and now before the court in respect of this part of the trial proceedings and in respect to each and all parties.

Mr. Belcher: Including all exhibits.

(Testimony of Ralph Jay.)

The Court: Including all exhibits.

Q. Mr. Jay, as certifying officer what are your duties?

A. The payment of civilian personnel employed by the Port of Embarkation, both ship and shore. As to ship side it was generally—it was the duty of the certifying officer shore side to pay the leave only of employees aboard transports.

Q. Certifying payrolls? A. Yes.

Q. In this instance I think you testified at the previous hearing you refused to certify William P. Thornton, whose name appeared on certain payrolls?

A. Yes, sir, for that period of the 10th through the 31st of July, 1947. Those were the only time sheets submitted to me.

Q. Did Mr. Thornton ever come and ask you for his pay? A. No, sir. [143]

Q. Did he ever communicate in any way with you with respect to his pay? A. No, sir.

Q. You were the paymaster during the period of time that Mr. Thornton had been previously in the employ of the Army?

A. I was certifying officer from 1 January, 1945 to 31 December, 1948 continuously.

Q. So that wherever Thornton's name appeared upon a payroll prior to July, 1947 you never questioned it? A. That is right.

Q. Why did you question it after the 10th of July, 1947?

(Testimony of Ralph Jay.)

A. Because he'd not been regularly appointed to the position he was occupying.

Q. What would have happened if you had paid him?

A. Iwould have assumed a personal liability for the amount paid.

Q. That is pursuant to regulations?

A. Yes, sir, civilian personnel regulation No. 120.

Q. Did you ever have any conversation with Mr. Thornton? A. No, sir.

Q. With respect to this matter either officially or otherwise? A. No, sir.

Mr. Belcher: I think that is all. [144]

Q. (By Mr. Belcher): You may state whether or not, if you know, Mr. Thornton had and still has an administrative remedy?

A. He had, and I would——

Q. What is that remedy?

Mr. Garland: I object to that as immaterial. This is the remedy we are pursuing.

The Court: If the respondent doesn't want the record to show that, you may not—I mean if the libelant objects, you may not show that over his objection, counsel.

Mr. Belcher: If Your Honor please——

The Court: You offer it on the grounds that that is in admiralty, although it is not an equity proceeding—that some proceedings may be of a like character?

(Testimony of Ralph Jay.)

Mr. Belcher: Yes, Your Honor.

The Court: Then the court's ruling is reversed, and the court will hear it upon that theory. Proceed.

The Witness: What was it?

A. The presentation of a claim to the claims division, to the general accounting office for reimbursement.

Q. Is that the usual and customary method where a man that has gotten employed improperly——[145] A. Yes, sir.

Mr. Belcher: You may inquire.

The Court: Have you any knowledge, Mr. Jay, as to how long this man worked and as to which he has not been paid by the Government? If so, will you state that now?

The Witness: Yes, sir. I have certified time sheets for the 10th through the 31st of July that I voided. Those were the only two I saw.

The Court: Is that evidenced by any document now in evidence as an exhibit?

The Witness: It is.

The Court: Can you state the exhibit?

The Witness: Exhibit A-3.

The Court: That answers the court's questions.

The Witness: There is more than that.

The Court: Is there another exhibit?

The Witness: There is another exhibit, A-2, which covers a period—I think it is to August 14, from August 1, to August 14. That is Exhibit A-2.

(Testimony of Ralph Jay.)

The Court: Do you know whether or not those two exhibits show all of the time during which he worked and in respect to which he has not been paid?

The Witness: I couldn't say that I know. I presume it is correct. It is duly certified. [146]

The Court: Can you tell from those exhibits how long he worked for the Government and had not been paid by the Government? If so, will you do that now?

The Witness: Yes, sir. There is 7 hours on July 10, 1947; 15 hours——

The Court: Wait a minute. July 10.

The Witness: 7 hours.

The Court: Next.

The Witness: July 11 through the 15th, 15 hours each.

The Court: Wait a minute. Just a moment. I don't understand.

The Witness: July 10, 7 hours.

The Court: I have that.

The Witness: July 11, 15 hours; 12th, 15 hours; 13th. 15 hours; 14th, 15 hours, and the 15th, 15 hours.

The Court: That means that each one of those days from the 11th to the 15th, inclusive, he worked 15 hours; is that right?

The Witness: Yes, sir.

The Court: That is right. When else did he

(Testimony of Ralph Jay.)

work and did not receive pay for such work, if there is any other time?

The Witness: The 16th to 31st of July, 1947.

The Court: Each day, 15 hours?

The Witness: Total, 240 hours for that period.

The Court: 240 hours from what date, the 15th to when?

The Witness: 16th of July to the 31st of July.

The Court: From July 16th to July 31st, inclusive?

The Witness: Yes, sir.

The Court: Any other day or any other time or occasion when he worked and has not been paid?

The Witness: We have.

The Court: If so——

The Witness: August 1——

The Court: August 1.

The Witness: Through August 14th, 1947.

The Court: How many hours?

The Witness: A total of 203 hours. On the 14th he only worked 8 hours.

The Court: Anyway, he has a total of 203 hours?

The Witness: Yes, sir, for that period.

The Court: Any other time that he worked and has not been paid?

The Witness: No, sir. There is no record. [148]

The Court: What is your understanding about whether or not these hours that you have just stated

(Testimony of Ralph Jay.)

constitute all the hours worked by libelant Thornton for which he has not been paid?

The Witness: It is my understanding that constitutes the entire amount.

The Court: There are five 15's. That makes 75, doesn't?

The Witness: Yes, sir.

The Court: And 240 and 203. According to my calculations all of those hours stated by you amount to the total aggregate number of 525 hours.

The Witness: 535, I believe, Your Honor. Well, no. There are 75 hours between July 11 and July 15. There is 7 on the 10th. That makes 82 hours.

The Court: I have that, and then you have 240 hours from the 16th to 31st of July.

The Witness: That is correct.

The Court: Then you have 203 hours from August 1st to 14th.

The Witness: Yes, sir.

The Court: Then add 82, 240 and 203—three and two are five; four and eight are twelve—two and five—three and two are five—525 hours, is it not? [149]

Mr. Belcher: That is correct.

The Witness: Is it 225?

Mr. Belcher: Yes.

The Court: What is the rate of pay, if you know, worked by him on the last payday when he was paid?

The Witness: I don't have that before me, Your Honor. I can consult the record.

(Testimony of Ralph Jay.)

The Court: Can you do that? Is there any objection to his consulting the record to find out what the rate of pay was?

Mr. Belcher: $17.25 per day for 15 hours.

Mr. Garland: There is no objection, Your Honor, to his testifying himself. Counsel stipulated. I'd rather the man testify.

The Court: I would like to know, if the witness has any way of telling the court now how much compensation he would have been authorized to work for that time that he would be entitled to have been paid for. That is the ultimate objective to which my inquiry leads.

The Witness: This authorization for the position shows $10.20 per day, but it doesn't indicate the number of hours in the tour. Of course, there is no record in the file here inasmuch as he wasn't appointed.

The Court: Those connected with this case are now excused until 2:00 o'clock. You may step down.

(Recess.)

Afternoon Session, August 9, 1949

(The witness Ralph Jay resumes the stand.)

Q. (Mr. Belcher): Mr. Jay, during the noon recess have you had occasion to ascertain the rate of pay, either hourly or weekly or daily or whatever it might be?

(Testimony of Ralph Jay.)

A. I have, sir. The rate was $1.15 per hour.

Q. $1.15 per hour? A. Yes, sir.

Mr. Belcher: I think that is all.

Cross-Examination

By Mr. Garland:

Q. Is there any overtime, or is that a straight $1.15 per hour?

A. It is a straight time.

Q. The fact that they worked 15 hours a day does not increase it at all?

A. No, sir.

Q. According to your time sheets was Capt. Thornton [151] acting as a night mate on the Goucher Victory? A. Yes, sir.

Q. Was any other person acting in that capacity at the same time Capt. Thornton was?

A. I am not prepared to answer that. I don't know, sir.

Q. You have no remembrance of any person so acting?

A. No, sir. I wouldn't know, anyway.

Q. Would you know whether or not the position of night mate was a customary and usual position to have on a ship situated such as the Goucher Victory was situated in this port?

A. It was a customary position regularly authorized by the office of chief of transportation.

Q. If anyone else had submitted time sheets for acting as night mate on the Goucher Victory at the

(Testimony of Ralph Jay.)

same time Capt. Thornton was acting, those time sheets would have come through your office?

A. Yes, sir.

Q. You have no recollection of any such time sheets? A. No, sir.

Mr. Garland: That is all.

(Witness steps down.) [152]

HARRY E. LEIGHTON

called as a witness in behalf of the respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name, please?

A. Harry E. Leighton.

Q. Are you a licensed captain?

A. Yes, sir.

The Court: How long have you been so licensed, Captain?

The Witness: Since 1917.

The Court: You have been working pretty generally all that time on Puget Sound?

The Witness: I have been with the Government thirty-seven years, sir.

Q. You were assistant marine superintendent in August of 1947, July and August?

A. Yes, sir.

Q. Captain, to constitute a valid member of the crew of the Goucher Victory I'll ask you whether or not it would be necessary for one to sign the articles?

(Testimony of Harry E. Leighton.)

A. In my estimation you have to sign the articles to be a member of the crew on any ship.

Q. Did Capt. Thornton sign articles in this instance? [153]

Mr. Garland: I believe the log would be the best evidence of that.

The Court: The objection is overruled.

Mr. Garland: The articles themselves.

The Court: This is proving the negative, a fact which is not alleged to be or contended to be covered by the law.

Mr. Garland: In the original testimony we subpoenaed the log, and they did not produce it.

Mr. Belcher: What?

Mr. Garland: We subpoenaed the log originally from this ship. We subpoenaed Capt. Leighton to produce the log, have it here.

(Whereupon, the questions appearing on lines 20 and 25 of the preceding page were read to the court.)

Mr. Garland: My objection is that the articles of the log of the ship speak for themselves as to what the captain signed. We anticipated that and asked by subpoena for the log to be presented here, and that was served upon Capt. Leighton and also upon the defense.

Mr. Belcher: When was that subpoena served?

The Court: I am going to sustain this objection.

Mr. Belcher: Allow an exception.

(Testimony of Harry E. Leighton.)

The Court: Allowed.

Mr. Belcher: I don't know whether I asked this question and he answered it or not:

The Court: I will say this: Notwithstanding the court's ruling, counsel on either side may by proper questions interrogate this witness as to whether or not it was customary to keep articles in —relating to the employment of these night officers on board these vessels while they were in port under this system of employment of night mates and/or other such officers.

Q. Capt. Leighton, you were assistant marine superintendent? A. Yes, sir.

Q. In July and August of 1947?

A. Yes, sir.

Q. What are the duties of a marine superintendent or an assistant marine superintendent?

A. An assistant marine superintendent at that time and at the present time—you have charge of all the floating equipment under the principal marine superintendent.

Q. When I speak of signing articles as a member of the crew, will you explain to the court just how that is accomplished?

A. The ship's agent, administrative agent on the ship, calls the men before him and signs the articles as to [155] their various positions, the date——

Q. Do those articles appear in the log of the ship

A. No, sir, they are a separate article altogether.

(Testimony of Harry E. Leighton.)

Q. A separate article altogether? A. Yes.

Q. What becomes of the articles?

A. There are five to seven copies. They are distributed around among the various heads of the departments. One goes to Washington, D.C.; one is kept on file down here.

Q. The log of a ship—what is the—what is the log of a ship?

A. The log of a ship tells of anything that may happen during the day or night. It is entered in the log book. It is supposed to be official.

Q. Are the names of the crew entered in the log book?

A. No, sir, except those who are on duty on the lookout, at the wheel and on the bridge.

Q. In your position as assistant marine superintendent is it your duty to know whether or not the ship was properly manned?

A. Yes, sir.

Q. From what source do you make inquiry to determine whether a ship is properly manned?

A. Generally you ask the mate how his crew is filled up. [156] We only have charge of the deck department.

Q. You only have charge of what?

A. The deck department on the ship.

Q. The deck department?

A. That is right.

Q. Were the duties that were performed by

(Testimony of Harry E. Leighton.)

Capt. Thornton duties to be performed in the deck department? A. Yes, sir.

Q. Did Mr. Thornton advise you at the time that he went to work on the 10th of July that he had been relieved of duty in May, 1947 on account of disability? A. No, sir.

Q. Did he inform you that he had been reemployed? A. No, sir.

The Court: Did he work?

The Witness: Yes, sir. He worked.

The Court: Did he work from July 10th to August 14th?

The Witness: To the best of my knowledge he did.

The Court: Do you know whether he has been paid for that work or not?

The Witness: I do not know.

The Court: You may inquire.

Q. Were you ever present at a conversation between Mr. [157] Miller and the libelant Capt. Thornton? A. No, sir.

Mr. Belcher: That is all.

Cross-Examination

By Mr. Garland:

Q. The position of the night mate on the Goucher Victory at the time Capt. Thornton worked there was a necessary and regular position, was it not?

A. No. That was a wartime position.

Q. I say, at the time Capt. Thornton worked

(Testimony of Harry E. Leighton.)

there. You had night mates on other ships similarly situated? A. On other ships?

Q. All the ships had them?

A. All the ships had them.

Q. At the time Capt. Thornton worked there was no one else to do that duty but Capt. Thornton? There was no one else who did work?

A. He was the only man who worked on that particular ship as night mate.

Q. And if he hadn't worked as night mate, someone else would have had to work as night mate?

A. Yes.

Q. And other than these formalities, you know of your own knowledge that his qualifications for seamanship and [158] ratings are such to qualify him for the position of night mate; isn't that right?

A. Should have been, yes, sir.

Q. You knew he was working as night mate at the time he did work? A. Oh, yes.

The Court: How do you classify your own position, Captain? I, at the moment, did not make a note.

The Witness: Assistant principal marine superintendent.

Mr. Garland: I have no furtther questions.

Redirect Examination

By Mr. Belcher:

Q. When a man is separated from service on account of disability is it customary to put him back to work without reprocessing him?

(Testimony of Harry E. Leighton.)

A. Not to my knowledge, no, sir.

Mr. Belcher: That is all.

Mr. Garland: No further questions.

The Court: Step down. Call the next witness.

Mr. Belcher: That is our case. The respondent rests.

The Court: The respondent rests. Any rebuttal?

Mr. Garland: I would like to put Capt. Thornton on for a short rebuttal.

The Court: You may do that. He has already been sworn. Well, under this libel, Captain, I believe I will have you sworn again.

LIBELANT'S REBUTTAL

WILLIAM P. THORNTON

libelant herein, being first duly sworn, on oath testified in his own behalf as follows:

Direct Examination

By Mr. Garland:

Q. Captain, were you at any time requested by any person to furnish—turn in your time?

A. Yes, sir.

Q. Tell the court under what circumstances while you were working on the Goucher Victory between July 10th and August 14th, 1947 you were requested to turn in your time, just what happened?

A. Yes. The ship was shifted down to pier 65, and it is quite a distance from 65 to the Port of Embarkation, so when I go off duty I go straight

(Testimony of William P. Thornton.)

home, and when I'd return to the ship—I live in Bremerton—and I would return right to the ship, so one morning there was a man in uniform, a soldier's uniform came with a slip of paper and told me to report at the marine superintendent's office this morning, meaning that [160] morning, and on arrival they said, "You haven't turned in your time yet." That was at Capt. Leighton's office. I went at once and put in my time up to that time.

Q. That was some time before you were officially notified you were through?

A. That was along, I would say the middle of July or a little later.

Q. You have already told the court, have you not, the circumstances under which you were hired?

A. What is that again?

Q. I say you told the court the circumstances under which you were hired already in your original testimony? A. Yes. Yes.

Q. You told them concerning your previous discharge from the service, how that took place?

A. Yes.

Mr. Garland: Other than repeating our testimony in chief, Your Honor, I have nothing to add to this man's testimony.

The Court: You may cross-examine.

Cross-Examination

By Mr. Belcher:

Q. At no time after your separation for dis-

(Testimony of William P. Thornton.)

ability on the 9th of May of 1947 did you ever make a written application for reinstatement? [161]

A. I never—only the first time I ever made a written application was when I first went into the Port in '42.

Q. You were familiar with the civil service rules?

A. There was lots of rules those days.

Q. Don't you know, as a matter of fact, Captain, that every time you changed your position you had to be processed through the personnel office?

A. No, not all the time.

Q. Well, how many times had you been processed through?

A. Well, there were several times I — quite a number of times; but there was a number of times I was transferred that I was not processed.

Q. Each time you were processed you had to take a physical examination, didn't you?

A. No, sir.

Q. Do you say you did not?

A. I said 'no.' No, sir.

Q. Didn't you yourself process papers for other employees? A. No.

Q. At no time?

A. Not to my knowledge, no.

Q. You were connected with the Coast Guard, weren't you, at one time?

A. The Coast Guard, many, many years ago with the Army—I mean with the Revenue Service, which

(Testimony of William P. Thornton.)

is now the Coast [162] Guard; but that was 1894—'96, rather.

Q. Didn't you serve in the Coast Guard with Captain Jennings, who was the man who hired you?

A. No.

Q. Sir?

A. No. Capt. Jennings used to work for me.

Q. Yes, in the Coast Guard.

A. No. I was port captain for the Puget Sound Navigation Company at that time.

Q. You were very, very good friends?

A. Not exactly, no.

Q. How long had you known Capt. Jennings?

A. Well, I would say I met him first about 1916. At that time he was quartermaster on the Iroquois.

Mr. Belcher: That is all. Oh, one question:

Q. Did you ever sign articles?

A. Did I what?

Q. Did you sign any articles? A. When?

Q. In July, 1947, before you went to work?

A. No.

Mr. Belcher: That is all. [163]

Redirect Examination

By Mr. Garland:

Q. Captain, did you sign the log?

A. I signed the ships log.

Q. How did you sign the ships log, why?

A. When I arrived aboard the ship it was the duty of the officers I was relieving to make me sign the log, and when I would leave the ship in the morning, why, I would sign it again, or he would

(Testimony of William P. Thornton.)

sign it, the officer that relieved me.

Mr. Garland: That is all.

Recross-Examination

By Mr. Belcher:

Q. You have been in the maritime service for a good many years, haven't you? A. Well, yes.

Q. And you knew in July, 1947, you—to become a valid member of the crew of the Goucher Victory it was necessary for you to sign the articles?

A. No, it wasn't necessary to sign articles. The night mates never sign articles. I have had night men aboard my ship and they never signed articles, and I have also been on other ships other than the Goucher Victory and never signed any articles.

Q. You were not then a member of the crew of the ship, were you?

A. I was signed on as a mate, night mate. That was my duty.

Q. Who signed you on?

A. I was told to go on.

Q. By whom?

A. I was told to go on by Mr. Merrill, George Merrill.

Q. When was that?

A. That was on the 10th day of July.

Q. George Merrill is the George Merrill who testified here this morning? A. Yes.

Q. He was a personnel officer, was he not?

A. No, no, no. In the Marine Superintendent's office.

(Testimony of William P. Thornton.)

Q. He was in the Marine Superintendent's office?

A. Yes, sir.

Q. Who did you first contact or who contacted you first in connection with this night mate's job?

A. I came down to the port looking for that kind of position, and I was looking for Merrill—Miller, rather, John Miller. I came to the Goodrich Building and Miller was not in the office at that time, and I waited a few minutes, and then I left, and just in front of Pier 39 I met Miller, and Miller—I told him I would like to [165] get one of those night mate's jobs. Shall I continue?

Mr. Garland: Go ahead. Continue.

A. He said, "We are not handling those any more. We have nothing to do with that whatever. However," he said, "Jennings has that now. Well," he said, "now, as a matter of fact, Capt. Leighton is the man to go to." And I in turn said to him then, "I have known Harry all my life, almost, and I'll go around and see him." So I went in and saw Harry, and he says, "Certainly, Bill." Those are the words he used. And he said, "By the way, have you been——" I can't use the word right now.

Mr. Garland: May I suggest, Your Honor, the word he wants?

The Court: No. Give him a chance to think of it himself.

A. I just can't say the word. Anyway—"Your services has been stopped to a certain extent." I said, "I don't know. I haven't received any dis-

(Testimony of William P. Thornton.)

charge yet." And—well, Harry said, "Well, we can fix that. Go on in and give your name to Mr. Merrill"—George Merrill, which sets just outside of the office, and I went out, and after talking to Merrill and putting my time down and everything, he said, "Now, by the way," he said, "when we call you up in Bremerton," he says, "you'll have to pay this, pay the long distance call." [166]

The Court: I know this is the second time, at least, this has been gone over. There is no need of telling something you told the other occasions when we were trying this case. Better proceed by question and answer.

Q. (By Mr. Belcher): Do you recall a conversation with Mr. Miller at a later date?

A. May the 9th.

Q. Captain, do you recall having had a conversation with Mr. Miller about the 29th of July, 1947 which was after you had gone to work?

A. No. That is not true.

Q. You didn't have a conversation?

A. No, sir.

Q. To refresh your recollection did he not ask you at that time on or about the date where you were working?

A. No. I never met him until the 14th day of August—after the 10th, or about the 9th of July, I would say. The next time I saw Miller was on the 14th of August, and I met him in practically the same place that I had met him when I asked him the first time about the night mate job.

(Testimony of William P. Thornton.)

Q. You never did receive—you know what the Form WD50 is, don't you?

A. No, I can't say I do. [167]

Q. Well, you know that you get a slip of paper, don't you, when you are hired?

A. Well, yes, yes, in some positions.

Q. Did you get a slip of paper from anybody?

A. No.

Q. On the 10th of July, 1947, before you went to work?

A. I was just told by Mr. Merrill—Miller—Mr. Merrill, rather,——

Q. Do you know where Mr. Miller is now?

A. No, I don't. I know where he was a month ago, though.

Q. As a matter of fact, don't you know that he is out at sea at the present time?

A. That he is what?

Q. He is at sea? A. He is at sea?

Q. Yes. A. Well, no.

Q. Didn't you know that?

A. No, I didn't know it.

Q. You subpoenaed him as a witness in the other case, didn't you? A. Yes, I believe we did.

Mr. Belcher: That is all.

Mr. Garland: That is all.

The Court: Step down, Captain. Call your [168] next witness.

Mr. Garland: We rest, Your Honor.

Mr. Belcher: Mr. Merrill in surrebuttal.

The Court: Call another witness.

Mr. Belcher: May I have just a second, if Your Honor please?

The Court: You may.

Mr. Belcher: I don't know why Mr. Merrill left, Your Honor. I can't get him here for—My information is that he did not contact Mr. Merrill, and Mr. Merrill did not tell him to go to work.

The Court: Well, is your information positive that Mr. Merrill would testify as your recollection and information indicates if he were here? That is the important thing.

Mr. Belcher: That is my idea, yes, Your Honor.

The Court: Is there any lack of agreement between counsel as to that fact? Could you——

Mr. Garland: No, there is no chance of us so stipulating, because my client has all the faith in the integrity of Mr. Merrill, and he says that isn't true, and if that isn't true, it should have been brought out on rebuttal, not surrebuttal, because our —I object on that ground, that it isn't proper surrebuttal, [169] even if brought forward; but I can't stipulate to it in the light of the testimony.

The Court: As I recall there was some testimony at the other trial proceedings on the former date by Capt. Thornton as to what dealings—as to what dealings he had with Mr. Merrill.

Mr. Garland: That is correct.

The Court: The objection is sustained. Call the next witness.

Mr. Belcher: We rest.

The Court: You may argue the case now. Proceed. The lawyers may proceed with argument. I'll hear you from your present stations.

(Whereupon, counsel made their final argument to the court.) [170]

The Court: In view of the fact that the Government through its authorized representatives hired the libelant for the period of work in question and did during that period actually accept the libelant's labor, and in view of the further fact that during that period no other person was hired to perform the duties for which libelant was hired and no other person was paid for performing duties for which the libelant was hired, and in view of the fact that the Government has been unduly enriched unless it pays libelant for the services actually rendered, and in view of the fact that the libelant has been damaged because of the failure of the Government to pay him for such wages, this Court is of the opinion and finds, concludes and decides that libelant may maintain this action against the Government under the Public Vessels Act, and particularly Section 781 thereof (being Section 781 of Title 46, U.S.C.A.) and is entitled to and may recover of and from the respondent United States of America for the hours actually worked by libelant as night mate on board the Goucher Victory from July 10th to August 16th, inclusive, 1947—for the total of 525 hours—at $1.15 per hour, and for such recovery libelant is entitled to judgment against respondent in this action.

The court will, after advising with counsel [171]

in the case as to their convenience, fix a later date on which the Court will settle and enter Findings of Fact, Conclusions of Law and Judgment carrying into effect this oral decision as announced.

(Whereupon, further argument was heard.)

The Court: This matter is continued until the 22d day of August. That will give you time——

Mr. Belcher: May I say there, if Your Honor please, that I am going to be busily engaged in a trial of a case on that day.

The Court: Very well. The court will set this case for this coming Monday, the 15th of August, forenoon for the purpose of settling the Findings of Fact and Decree, and I ask counsel for the libelant to serve the papers on the respondent's counsel so he may be prepared to make any objections to them he may wish to make.

(Adjournment.) [172]

CERTIFICATE

I, J. R. Wheeling, do hereby certify that I am official reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JOSEPH R. WHEELING,
Official Court Reporter.

[Endorsed]: Filed December 15, 1949. [173]

[Endorsed]: No. 12428. United States Court of Appeals for the Ninth Circuit. United States of America, Appellants, vs. William P. Thornton, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
In Admiralty No. 12428

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM P. THORNTON,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD

To the Honorable Judges of the above entitled Court:

Appellant herein, United States of America, hereby refers to and adopts as its Statement of Points on which it intends to rely upon appeal, the assign-

ment of error included in the apostles on appeal heretofore transmitted to this Court; and

The said appellant hereby designates that the entire record (apostles on appeal) heretofore transmitted to the court in this action be printed, together with this designation and adoption of Statement of Points on Appeal.

Respectfully submitted,
/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Affidavit of service attached.

[Endorsed]: Filed Dec. 22, 1949.

No. 12428

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

H. G. MORISON,
Assistant Attorney General
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.
JOHN E. BELCHER,
Assistant United States Attorney.

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In the United States Court of Appeals for the Ninth Circuit

No. 12428

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

JURISDICTION

Appellee brought this suit to recover compensation for official services as an officer of the United States by virtue of appointment as a civil-service employee of the United States, serving from July 10 to August 14, 1947, in the capacity of night mate aboard the United States Army Transport *Goucher Victory.*

Appellee's suit was originally begun July 7, 1948, by a civil complaint, invoking the jurisdiction of the district court under the Tucker Act, former 28 U. S. Code 41 (20), now 28 U. S. Code 1346 (a) (R. 2–4). The Government answered (R. 6) and moved to dismiss on the ground that the court had no jurisdiction by reason of the exception found in the

Tucker Act of district court jurisdiction of suits to recover "compensation for official services of officers of the United States" (R. 15–16). Thereafter, on July 5, 1949, appellee petitioned to amend and transfer his suit to the admiralty side of the court, and, "being satisfied that jurisdiction should be invoked under the Public Vessels Act" (R. 20–21), tendered with his petition an amended libel, invoking the jurisdiction of the district court under the Public Vessels and Suits in Admiralty Acts (R. 20–25). With the Government's acquiescence the district court, on July 13, 1949, ordered the transfer and allowed the filing of the amended libel (R. 25–27), the Government filing protective exceptions and motion to dismiss (R. 31).

The district court, Honorable John C. Bowen, District Judge, on August 15, 1949, filed findings of fact, conclusions of law, and a decree under the Public Vessels Act, awarding appellee $603.75, together with interest at the rate of six percent per annum from the date of entry of the decree (R. 33–38). The Government filed notice of appeal on November 8, 1949 (R. 38–39) and on December 13, 1949, assigned error as to the jurisdiction and as to the award of interest in excess of four percent (R. 42). The jurisdiction of this Court rests upon 28 U. S. Code 1291.

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction of the cause of action under the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 781–782 and 742–743); and if so,

2. Whether the district court had jurisdiction to award interest at any rate in excess of four percent, in view of the provision of 46 U. S. Code 782, directing Public Vessels Act suits "to proceed in accordance with the provisions of" the Suits in Admiralty Act which, in 46 U. S. Code 743, limits interest to four percent.

STATEMENT

The principal facts were not disputed and may be summarized from the findings of the district court (R. 34–35). Between July 10 and August 14, 1947, the United States was the owner of the United States Army Transport *Goucher Victory,* employed exclusively as a public vessel and stationed at the Port of Seattle, Washington. For 35 days during that period appellee William P. Thornton, while employed by the Army, worked 525 hours at the rate of $1.15 per hour as Night Mate on that vessel pursuant to the orders of the Marine Superintendent of the Seattle Port of Embarkation who was "a person having authority to hire" appellee. These services were necessary to the United States, which employed no other person to perform them and accepted their benefit but failed to pay appellee their conceded value of $603.75.

The reason for the failure of appellee to obtain payment was not disputed nor specifically found by the district court. From the whole of the record it appears to have been because of administrative confusion. The fiscal official responsible for certifying appellee's pay roll was afraid to do so, apparently for

fear that the amount would be charged back against him personally as an invalid payment. Appellee's status was that of an intermittent or per diem civil-service employee, receiving official compensation only for the time he was actually working. Appellee had been ordered to perform the particular job in question after certain administrative steps had been taken to terminate his general status of civil-service employee, but before all steps had been completed and before either he or the operating official who ordered him to work had been notified of the termination. In the circumstances, the district court appears to have believed appellee performed the work under his validly subsisting prior appointment. That conclusion was acquiesced in by the Government in the court below and is not questioned here.

ARGUMENT

I

This Court must determine the validity of its prior holdings that the Public Vessels Act extends jurisdiction to all suits for damages caused by public vessels, including persons acting in their behalf

In reliance upon the statute's literal language and the decisions of this Court in *United States* v. *Loyola,* (9th Cir.) 1947 A. M. C. 994, 161 F. 2d 126, 127, and *O. F. Nelson & Co.* v. *United States,* (9th Cir.) 1945 A. M. C. 1161, 149 F. 2d 692, 698, as well as of the Supreme Court and other courts of appeals in *Canadian Aviator, Inc.* v. *United States,* 1946 A. M. C. 1730, 324 U. S. 215, 228; *American Stevedores* v. *Porello,* 1947 A. M. C. 349, 330 U. S. 446, 450, and *United States* v. *Caffrey,* (2d Cir.) 1944 A. M .C. 439, 141 F. 2d 69, 70, cert. den. 319 U. S. 730, many suits

for wages have been brought and maintained under the Public Vessels and Suits in Admiralty Acts by civil-service seamen of the Army Transport Service and the numerous other government agencies employing public vessels of the United States exclusively as public vessels and not as merchant vessels. It has always been regarded as inequitable in the highest degree to reject the literal language of the statute and this Court's view and attempt to distinguish between the rights of civil-service seamen serving on public vessels according as the vessels are employed solely as public vessels or employed as "merchant vessel" by reason of carrying some commercial cargo or passengers for hire. The distinction is often one of quantity and degree and is largely accidental so that seamen's rights ought not to depend on it. Cf. *The Western Maid,* (1922) 257 U. S. 419; *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108; *The Lake Lida,* (4th Cir., 1923) 290 Fed. 178.

It has never been questioned that civil-service seamen, seeking recovery for services on public vessels which are employed as merchant vessels, have the seaman's traditional remedy by suit in admiralty to recover for wages as well as for maintenance and cure and that jurisdiction of such suits is founded on the Suits in Admiralty Act with its two-year statute of limitations (46 U. S. Code 743). Cf. *McCrea* v. *United States,* 1935 A. M. C. 1, 294 U. S. 23. Civil-service seamen such as appellee here, serving on public vessels, such as hospital ships, army tranports, coastal survey vessels and harbor and river patrol craft of all services, which are employed exclusively as public

vessels, have equally enjoyed the same remedy under the Public Vessels Act with the same two-year limitation (46 U. S. Code 782, 743).

In the companion appeal, No. 12400, *Thomason et al.* v. *United States,* now pending before this Court, the contention is for the first time being made that such civil-service seamen serving on vessels which chance to be employed exclusively as public vessels do not have the same traditional remedy in admiralty as they would have had if the vessels had carried some commercial cargo, so as to be "employed as merchant vessels. They are therefore not subject to the two-year limitation but, instead, may bring suit at law under the Tucker Act (28 U. S. Code 1346, former 28 U. S. Code 41 (20)) where, however, they can obtain the benefit of the six-year statute of limitations.

This contention for unequal treatment of civil-service seamen of public vessels according to the use the Government chances to make of the vessel is not being made by the United States, which on the contrary is resisting the claim to unequal treatment. It is being made by the attorneys for *Thomason et al.* They urge this unequal treatment in order to permit the seamen in that particular case, who failed to file timely suit within the two-year statute of limitations provided by the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 782, 743), to now bring suit within the six-year limitation of the Tucker Act (28 U. S. Code 2401 (a), former 28 U. S. Code 41 (20)).

The attorneys for the Government cannot voluntarily confer jurisdiction on the district court. *Minnesota* v. *United States,* (1939) 305 U. S. 382, 388; *Munro* v. *United States,* (1937) 303 U. S. 36, 41. But we be-

lieve in the present case the court below correctly followed the prior decisions of this Court and held it had jurisdiction of the present suit under the Public Vessels and Suits in Admiralty Acts. We point to the question of jurisdiction found in the record in this case solely because if this Court accepts the contention of appellants in No. 12400, overrules its prior decisions and reverses that case, then, but only then, the decree for appellee in this case must likewise be reversed.

We believe that the literal language of the statute as followed by this Court's decision in *United States* v. *Loyola,* 1947 A. M. C. 994, 161 F. 2d 126, and by the decision of Judge Mathes in *Jentry* v. *United States* (S. D. Calif.), 1948 A. M. C. 58, 73 F. Supp. 899, are fully dispositive of the question of the district court's jurisdiction in this present case. The statute (46 U. S. Code 781) provides:

> A libel in personam in admiralty may be brought against the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.

And it is elementary that a libel *for damages* is all inclusive for "damages" is the compensation awarded for breach of any obligation, whether sounding in contract or tort.

It is equally familiar that a libel or civil action for money *damages* is the only remedy against itself to which the United States has ever consented. Thus the Tucker Act authorizes suits for "*damages* in cases not sounding in tort" (28 U. S. Code 1346 (a–2)).

"Damages consist in compensation for loss sustained. * * * By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." See *The Steel Trader,* 1928 A. M. C. 162, 275 U. S. 388, 391, quoting Sedgwick's *Damages.* And the language of the Public Vessels Act itself confirms that claims for "damages" through breach of contract as well as tort are included, for it expressly provides (46 U. S. Code 782) that no interest shall be allowed prior to judgment except "upon a contract expressly stipulating for the payment of interest."

The Public Vessels Act, just like the Tucker Act, thus permits the bringing of suits "for damages" for breach of contract. But unlike the Tucker Act it is not confined to "cases not sounding in tort." The Public Vessels Act, complementing the Suits in Admiralty Act, authorizes libels "for damages" in tort and contract alike. Thus the Supreme Court in *American Stevedores* v. *Porello,* 1946 A. M. C. 163, 330 U. S. 446, 450, fn. 6, called particular attention to the fact that the statute used the word *damages* "which means a compensation in money for loss or damage." And in *Canadian Aviator* v. *United States,* 1946 A. M. C. 1730, 324 U. S. 215, 228, the court had previously expressly declared, "We hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner."

The fact that appellee's damages were caused by the breach of his contract of employment by persons

acting on behalf of the vessel, rather than by the public vessel itself as an instrument, involves nothing more than the traditional admiralty personification of the vessel. Indeed the Supreme Court in the *Canadian Aviator* case has pointed out that in using such language Congress merely adopted "the customary legal terminology of the admiralty law," which refers to the vessel as causing every act which her personnel do in her behalf. "Such personification of the vessel," said the Court, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." And in *Porello,* as we have seen, the Court emphasized that in providing for suit "for damages" Congress undoubtedly had firmly in mind the distinction between "damage," meaning merely loss or injury, and its plural, "damages," meaning the compensation recovered in money for loss or damage however caused. If there still lingers in the language something of the flavor of tort we need not be surprised. At the common law it is familiar that the action for breach of a simple contract was in *assumpsit,* a writ framed on the case after those sounding in tort for trespass or deceit. Ames, *History of Assumpsit,* 3 Select Essays on Anglo-American Legal History 259.

Considerations of practical convenience demand equality of treatment of civil-service seamen serving on government vessels, whether the vessels are employed by the Government as "merchant vessels" or exclusively as public vessels. The rule of strict con-

struction of statutes permitting suit against the sovereign should not be employed to create arbitrary distinctions which serve only to frustrate honest litigants and make cases turn on the accidents of operations. Courts should not be unmindful of the rule that, "The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures." *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 53–54. But as the Supreme Court itself there noted, "When authority to sue is given that authority is liberally construed to accomplish its purpose." See also *United States* v. *Shaw,* 309 U. S. 495, 501; *New England Maritime Co.* v. *United States,* (D. Mass.) 1932 A. M. C. 323, 55 F. 2d 674, 685, aff'd without opinion 73 F. 2d 1016; cf. *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. at 222. So Judge Cardozo, in *Anderson* v. *Hayes Const. Co.,* (1926) 243 N. Y. 140, 147, 153 N. E. 28, 29, observed, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

II

The district court had no jurisdiction to award interest at six percent in accordance with local law instead of at four percent as authorized by the suits in Admiralty Act

The court below correctly followed the Public Vessels Act in confining its award of interest to the period subsequent to the entry of the decree (R. 36,

39). See 46 U. S. Code 782. But the court, erroneously in our view, applied the local six percent rate instead of the four percent rate which marks the limit of its jurisdiction by reason of the provision of the Suits in Admiralty Act (46 U. S. Code 743).

With respect to the question of interest, the Public Vessels Act incorporates by reference the provision of the Suits in Admiralty Act. The Public Vessels Act provides (46 U. S. Code 782):

> Such suit shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same is not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

The Suits in Admiralty Act provides (46 U. S. Code 743):

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States * * * may include costs of suit and, when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

Appellee's contract of employment made no provision for interest in the event of breach at any higher rate or at all.

We believe that the Public Vessels and Suits in Admiralty Acts limit the jurisdiction of the district court to award interest so that it has no power to make an award in excess of four precent. This is the usual rate allowed against the Government and is the same rate which is provided by the Tucker and Tort Claims Acts (28 U. S. Code 2411, 2516). Until recently the four percent rate has gone unchallenged. The ground given for the contrary holdings in recent district court cases, and which, we assume, the court below also adopted, is that the rate of interest is not one of the matters of *procedure* referred by Section 782 of the Public Vessels Act to Section 743 of the Suits in Admiralty Act, but is exclusively dealt with in Section 782, which merely forbids the allowance of interest prior to the rendition of judgment but names no rate.

We believe, on the contrary, that the Congressional language and intention, to refer the rate of interest to the earlier Act, is plain and that the four percent rate is to prevail. Exactly the same question arose in respect of the incorporation in the Public Vessels Act by reference of the statute of limitations of the Suits in Admiralty Act. The Government's position was upheld as to the limitation question in *Phalen* v. *United States,* (2d Cir.) 1929 A. M. C. 723, 32 F. 2d 687. We believe the same principle controls here.

The prohibition in 46 U. S. Code 782 of interest under the Public Vessels Act prior to judgment leaves the four percent rate controlling just as surely as does

the similar prohibition in 46 U. S. Code 745 of interest under the Suits in Admiralty Act prior to the filing of the libel. Cf. *United States* v. *Eastern SS. Lines,* (1st Cir.) 1949 A. M. C. 243, 171 F. 2d 589, 593–594; *National Bulk Carriers* v. *United States,* (3d Cir.) 1948 A. M. C. 735, 1563, 169 F. 2d 943, 949–951; *The Wright,* (2d Cir.) 1940 A. M. C. 735, 109 F. 2d 699, 701.

This interpretation accords with the general rule that interest is not awarded against the United States in the absence of the plainest and most obvious language. *United States* v. *New York Rayon Co.,* (1947) 329 U. S. 654, 658; *United States* v. *Thayer West Point Hotel Co.,* (1947) 329 U. S. 585; *Albrecht* v. *United States,* (1947) 329 U. S. 599, 605; *Boston Sand & Gravel Co.* v. *United States,* (1928) 278 U. S. 41, 47. It applies the traditional immunity of the sovereign from payment of interest. *United States* v. *Goltra,* (1941) 312 U. S. 203, 207; *Smyth* v. *United States,* (1937) 302 U. S. 329, 353; *United States* v. *North Carolina,* (1890) 136 U. S. 211, 216; *Angarica* v. *Bayard,* (1888) 127 U. S. 251, 260. We accordingly submit that this Court should modify the decree of the court below so as to award interest at the rate of four percent instead of the six percent rate now provided by the decree.

CONCLUSION

For the foregoing reasons, unless this Court should decide to overrule its prior decisions and reverse in No. 12,400, *Thomason et al* v. *United States,* we believe that the judgment of the court should be

affirmed subject only to being modified so as to reduce the award of interest to four percent.

Respectfully submitted,

H. G. MORISON,
Assistant Attorney General.

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney,

JOHN E. BELCHER,
Assistant United States Attorney.

MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE: 19[illegible]

No. 12428

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF WILLIAM P. THORNTON

MARION GARLAND
and
WILLIAM R. GARLAND,
Attorneys for the Appellee.

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No. 12428

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF THE APPELLEE, WILLIAM P. THORNTON

JURISDICTION

Jurisdiction is not questioned and is as set out in the appellant's brief.

QUESTIONS PRESENTED

No additional questions.

STATEMENT

Statement of the appellant is fair and ample for the questions involved.

ARGUMENT

I

ARGUMENT THAT PUBLIC VESSELS ACT APPLIES

There is no question but what the argument of the United States is correct that the appellee should have been given judgment under the statute which it sued.

We failed to follow his argument that because the Public Vessels Act (46 U. S. Code 782, 743) applies in a case similar to this that it precludes the application of the Tucker and Tort Claims Acts (28 U. S. Code 2411, 2516) as neither act purports to be an exclusive act and it can readily be seen that each case must rest on its own bottom and the fact that a plaintiff might have two remedies would not be unusual.

The argument as far as this case is concerned is purely academic, as the appellant conceeds that we have brought the action under a correct act to give us the relief.

II

Argument as to Whether Four or Six Per Cent Interest Should Apply.

We have checked the law in this matter and find that the following case, in our opinion, is directly in point and holds that the four per cent should apply, *Lauro v. U. S.*, 168 F. (2d) 714. This case is from the Second Circuit and is not binding on your honors.

Again, whether four per cent interest is held to apply or six per cent is held to apply from date of judgment would not make over Twelve Dollars ($12.00) difference in the total amount of judgment at the end of the year, and we pray that your honors, in affirming this case, do not decide that the appellee must pay costs even if you decide the four per cent interest applies.

In other words, the question of four or six per cent interest in a case of this kind is so trivial that the appellee should not have to pay costs because of the decision adverse to him on this point.

CONCLUSION

WHEREFOR, appellee prays that the decision of the District Court should be affirmed, with interest at four per cent and costs to be paid by the appellant.

Respectfully submitted,

MARION GARLAND *and*
WILLIAM R. GARLAND,
Attorneys for the Appellee.

APRIL 1950.

No. 12428

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

H. G. MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.
JOHN E. BELCHER,
Assistant United States Attorney.

In the United States Court of Appeals for the Ninth Circuit

No. 12428

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

The United States respectfully petitions the Court for a rehearing of the decision herein, entered on August 21, 1950, in respect of the question of the rate of interest applicable under the Public Vessels Act.

The Court has affirmed without mention the action of the court below, erroneous in our view, awarding interest at the local six percent rate instead of the four percent rate which marks the limit of its jurisdiction by reason of the Suits in Admiralty Act, as supplemented and amended by the Public Vessels Act (46 U.S.C. 743, 782). The per curiam disposition of this case by reference to the Court's opinion in *Thomason v. United States* leaves unanswered this important question as to the rate of interest. It is difficult to tell whether the Court intends to go into conflict with the opinion of the Second Circuit in *Lauro* v. *United States,* 1947 A.M.C. 1475, 163 F. 2d 642, 1948 A.M.C. 1442, 168 F. 2d 714, and require henceforth that interest at the local rate be awarded, or whether it has inadvertently

overlooked the importance of the matter because of the small amount.[1]

It is respectfully submitted that for the guidance of the lower courts at least a clarification of the memorandum per curiam in this case is in order. Finally, the question is one of jurisdiction and it is therefore possible that the United States may be required to petition for certiorari in order to resolve the conflict of circuits. In that event, it will be desirable that there should be no obscurity in the record as to this Court's reasoning.

I

We believe that the Public Vessels and Suits in Admiralty Acts equally limit the jurisdiction of the district court to award interest so that it has no power to make an award in excess of four percent. This is the usual rate allowed against the Government and is the same rate which is provided by the Tucker and Tort Claims Acts (28 U. S. Code 2411, 2516). Its application is required by the policy of uniformity which this Court has found controlling in the companion case of *Thomason* v. *United States.*

With respect to the question of interest, the Public Vessels Act incorporates by reference the provision of the Suits in Admiralty Act. The Public Vessels Act provides (46 U. S. Code 782):

> Such suit shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same is not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

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[1] No question of casting the appellee in costs is involved. In admiralty it is settled that an appellant only partially successful does not recover costs. *The Anna W.,* (2d Cir., 1912) 201 Fed. 58, 62; *The Winfield S. Cahill,* (2d Cir., 1919) 258 Fed. 318, 321. Costs on appeal are discretionary with the court. *The Pendragon Castle,* (2d Cir., 1924) 1925 A.M.C. 146, 5 F. 2d 56, 58; *The St. Paul,* (2d Cir., 1921) 271 Fed. 265, 267; *The James McWilliams,* (2d Cir., 1917) 240 Fed. 951, 952.

The Suits in Admiralty Act provides (46 U. S. Code 743):

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States * * * may include costs of suit and, when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

Appellee's contract of employment made no provision for interest in the event of breach at any higher rate or at all. We believe the plain terms of the statutes therefore limit interest to four percent.

II

Until recently the four percent rate has gone unchallenged. The only case to deal with the point characterized the application of the higher six percent state interest rate as "anomalous." *Lauro* v. *United States,* (2d Cir.) 1947 A.M.C. 1476, 163 F. 2d 642, 643, further proceedings 1948 A.M.C. 1442, 168 F. 2d 714.

The ground given for the contrary holdings in recent district court cases, and which, we assume, the court below also adopted, is that the rate of interest is not one of the matters of *procedure* referred by Section 782 of the Public Vessels Act to Section 743 of the Suits in Admiralty Act, but is exclusively dealt with in Section 782, which merely forbids the allowance of interest prior to the rendition of judgment but names no rate. We believe, on the contrary, that the Congressional language and intention, to refer the rate of interest to the earlier Act, is plain and that the four percent rate is to prevail. The prohibition in Section 2 of the Public Vessels Act (46 U. S. Code 782) of interest under that Act prior to judgment leaves the four percent rate of the Suits in Admiralty Act controlling so far as concerns the rate just as surely as does the similar prohibition in section 5 of the Suits in Admiralty Act (46 U. S. Code

745) of interest under the Suits in Admiralty Act prior to the filing of the libel.[2]

Exactly the same question of the incorporation by reference in the Public Vessels Act of the Suits in Admiralty Act arose in respect of the statute of limitations. The Government's position that the Suits in Admiralty Act controls was upheld as to the limitation question in *Phalen* v. *United States,* (2d Cir.) 1929 A.M.C. 723, 32 F. 2d 687. The two years limitation of the Suits in Admiralty Act was held to bar the court from jurisdiction at any later date under the Public Vessels Act. We believe the same principle applies here. The four percent limitation of the Suits in Admiralty Act bars the court from jurisdiction to award any higher rate under the Public Vessels Act.

Finally, the interpretation we advocate accords with the general rule that interest is not awarded against the United States except in accordance with the plainest and most obvious language. *United States* v. *New York Rayon Co.,* (1947) 329 U.S. 654, 658.[3] It merely applies the traditional immunity of the sovereign from payment of interest.[4]

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[2] Cf. *United States* v. *Eastern SS. Lines,* (1st Cir.) 1949 A.M.C. 243, 171 F. 2d 589, 593-594; *National Bulk Carriers* v. *United States,* (3d Cir.) 1948 A.M.C. 735, 1563, 169 F. 2d 943, 949-951; *The Wright,* (2d Cir.) 1940 A.M.C. 735, 109 F. 2d 699, 701.

[3] See also *United States* v. *Thayer West Point Hotel Co.,* (1947) 329 U.S. 585; *Albrecht* v. *United States,* (1947) 329 U.S. 599. 605; *Boston Sand & Gravel Co.* v. *United States,* (1928) 278 U.S. 41, 47.

[4] See *United States* v. *Goltra,* (1941) 312 U.S. 203, 207; *Smyth* v. *United States,* (1937) 302 U.S. 329, 353; *United States* v. *North Carolina,* (1890) 136 U.S. 211, 216; *Angarica* v. *Bayard,* (1888) 127 U.S. 251, 260.

CONCLUSION

For the foregoing reasons, we submit that this Court should modify the decree of the court below so as to award interest at the rate of four percent instead of the six percent rate now provided by the decree of the court below.

Respectfully submitted,

H. G. Morison,
Assistant Attorney General.
Leavenworth Colby,
Keith R. Ferguson,
Special Assistants to the Attorney General.

J. Charles Dennis,
United States Attorney,
John E. Belcher,
Assistant United States Attorney.

September 1950.

I hereby certify that I have examined the foregoing petition and, in my opinion, it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

Leavenworth Colby.

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No. 12429

United States
Court of Appeals
For the Ninth Circuit.

HUDSON LUMBER COMPANY, a Corporation, and ELKINS SAWMILL INCORPORATED,

Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court, Northern District of California. Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12429

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For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States for the Northern District of California, Southern Division

No. 29100H

HUDSON LUMBER COMPANY, a Delaware corporation, and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION, a New York corporation, and SHASTA PLYWOOD, INC., a Nevada corporation, FIRST DOE, SECOND DOE, and FIRST DOE COMPANY, a corporation,

Defendants.

PETITION FOR REMOVAL OF CIVIL ACTION FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

To the Honorable Judges of Said District Court of the United States:

Your petitioners, United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corporation, the defendants above named, respectfully show:

I.

That a civil action has been brought and is now pending in the Superior Court of the State of California in and for the County of Alameda, a state court, wherein Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, are plaintiffs and your petitioners are defendants, which action is designated by general No. 220984, and is hereinafter sometimes referred to as "said action No. 220984."

II.

That said action No. 220984 is a civil action for a declaratory judgment and injunction, and the matter in controversy, at the commencement of said action and at the present time, exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

III.

That petitioners hereby petition to remove said action No. 220984 to this court upon the ground and for the reason that said civil action is one of which the District Courts have original jurisdiction and none of the parties in interest, properly joined and served as defendants, is a citizen of the State of California; that at the time of the commencement of this action, and at all times since, the defendant United States Plywood Corporation was a corporation organized and existing under the laws of the State of New York, and defendant Shasta Plywood,

Inc. was a corporation organized and existing under the laws of the State of Nevada, and neither of said defendants was, or is a citizen or resident of California; that the defendant First Doe, Second Doe and First Doe Company, a corporation, are fictitious names and no service of process has been had upon them. That at the time of commencement of this action and all times since, the plaintiff Hudson Lumber Company was a corporation organized and existing under the laws of the State of Delaware, and plaintiff Elkins Sawmill Incorporated was a corporation organized and existing under the laws of the State of California.

IV.

That a copy of the initial pleading setting forth the claim for relief upon which such action is based, together with Summons, was first received by the defendants, United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corporation, through service upon them on August 8, 1949. A copy of said Summons and of said Complaint is attached hereto as Exhibit "1," and is hereby made a part of this petition.

V.

Your petitioners herewith present a good and sufficient bond, as provided by the statute, conditioned that your petitioners, the defendants United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corpora-

tion, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioners pray that the said action No. 220984 be removed from said state court into this court for trial and determination; that this court accept said bond and make and enter an order of removal of said action No. 220984, and that the court make and enter such other and further orders as may be proper and necessary in the premises.

McMICKEN, RUPP &
SCHWEPPE,
/s/ M. A. MARQUIS.
PILLSBURY, MADISON
& SUTRO,
/s/ EUGENE M. PRINCE.

Of Counsel for Defendants, Petitioners, United States Plywood Corporation and Shasta Plywood, Inc.

State of Washington,
County of King—ss.

W. C. Bailey, being first duly sworn, says: That he is Vice President of United States Plywood Corporation and President of Shasta Plywood, Inc., the above-named petitioners, and makes this verification on their behalf; that he has read the fore-

going petition, and that the allegations therein are true of his own knowledge.

/s/ W. C. BAILEY.

Subscribed and sworn to before me this 25th day of August, 1949.

[Seal] /s/ JANE CARMODY,

Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT NO. 1

Superior Court of the State of California in and for the County of Alameda

Department No. ....

Action No. 220984
038329

HUDSON LUMBER COMPANY, a Delaware corporation, and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION, a New York corporation, and SHASTA PLYWOOD, INC., a Nevada corporation, FIRST DOE, SECOND DOE, and FIRST DOE COMPANY, a corporation,

Defendants.

SUMMONS

The People of the State of California to United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corporation, First Doe, Second Doe and First Doe Company, a corporation, Defendants.

You are hereby directed to appear and answer the complaint filed in the County of Alameda in an action entitled as above, brought against you in the Superior Court of the State of California in and

for the County of Alameda, within ten days after the service on you of this summons — if served within said County, or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Witness my hand and the seal of the Superior Court of the State of California in and for the County of Alameda this 4th day of August, 1949.

G. E. WADE,
Clerk.
By FRANK SCHNEPPLE,
Deputy.
BRUNER & GILMORE,
McKEE, TASHEIRA & WAHR-
HAFTIG, RIDLEY STONE,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 4, 1949.
G. E. WADE,
County Clerk,
By FRANK SCHNEPPLE,
Deputy.

In the Superior Court of the State of California
in and for the County of Alameda

038329

No. 220984

HUDSON LUMBER COMPANY, a Delaware corporation, and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION, a New York corporation, and SHASTA PLYWOOD, INC., a Nevada corporation, FIRST DOE, SECOND DOE, and FIRST DOE COMPANY, a corporation,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF AND FOR INJUNCTION

Plaintiffs above named complain of defendants above named and each of them, and for cause of action allege as follows:

I.

Plaintiff Hudson Lumber Company is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has duly qualified to do business in the State of California and

has its principal place of business in the County of Alameda, State of California.

II.

Plaintiff Elkins Sawmill Incorporated is now and was at all times herein mentioned a corporation organized and existing under the laws of the State of California, and has its principal place of business in the County of Alameda, State of California.

III.

Defendant United States Plywood Corporation is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of New York, and is duly qualified to do business in the State of California.

IV.

Defendant Shasta Plywood, Inc. is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business in the State of California.

V.

The names First Doe, Second Doe and First Doe Company, a corporation, are fictitious. The true names of said fictitiously named defendants are unknown to plaintiffs. When the true names of any of said defendants are ascertained plaintiffs will,

by leave of Court, insert such true names in the record of this action with the allegations to charge them.

VI.

On December 9, 1947, the defendant United States Plywood Corporation entered into a contract in writing with plaintiff Hudson Lumber Company, a true copy of which is attached hereto, marked "Exhibit A," referred to hereby, and by such reference incorporated herein.

VII.

In and by said contract said parties agreed, among other things, that said defendant would sell and deliver to said plaintiff, and said plaintiff would buy and pay for all merchantable incense cedar logs derived from a certain tract mentioned in said contract, upon which said defendant had lately acquired the outright purchase and cutting rights to timber (referred to in said contract as the La Tour Timber). Said contract provided, among other things, that the merchantability of said logs should be determined in the manner specified in the cutting contract referred to therein between said defendant and La Tour Peak Timber Company, dated May 21, 1947, a copy of the provision of which relating to merchantability of logs is attached hereto, marked "Exhibit B," referred to hereby, and by such reference incorporated herein.

VIII.

In and by said contract between said plaintiff and said defendant (Exhibit A) it was further provided, among other things, that said plaintiff should pay for said incense cedar logs the actual cost of such logs, as further defined in said contract, plus ten per cent (10%) of such cost.

IX.

The definition of such cost, as further contained in said contract, included among other items the following:

"The actual cost to Harbor and U. S. Plywood of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as Hudson may direct, whether done by Harbor or U. S. Plywood or under contract by an independent logger or loggers, provided that the destination of Hudson's logs shall be substantially adjacent to the destination of the remaining logs cut from the La Tour timber; and provided, further, that no logging or road-building profit of any Company which is a subsidiary of or affiliated with Harbor or U. S. Plywood shall be allowed in computing Hudson's Cost hereunder."

* * *

"With the exception of the stumpage charge payable pursuant to subdivision (i) hereof, logging costs, as hereinabove defined, shall be computed on a common cost per M ft. for all species derived from

the La Tour timber and this common cost will be the cost per M ft. of cedar logs delivered to Hudson hereunder."

X.

The parties thereupon commenced operations under said contract and have continued and now carry on the same. Said plaintiff Hudson Lumber Company has caused the plaintiff Elkins Sawmill Incorporated to receive deliveries of said cedar logs under said contract and to pay for the same; and said plaintiff Elkins Sawmill Incorporated has an interest in the subject matter of the contract, and is a party in interest in the controversy hereinafter set forth.

Plaintiffs are informed and believe and upon such information and belief allege that Harbor Plywood Corporation, mentioned in said contract as a party in interest therein with United States Plywood Corporation, has relinquished or abandoned its interest in said contract, and that said defendant United States Plywood Corporation has assumed the management of operations thereunder, and that, by reason thereof, pursuant to the provisions of Article 3 (e) of said contract, said defendant has been substituted for said Harbor Plywood Corporation as the party in interest thereunder.

Plaintiffs are further informed and believe, and upon such information and belief allege, that defendant Shasta Plywood, Inc. has acquired some

part of the seller's interest under said contract, but the exact nature and extent of the interest so acquired, and the exact manner of its acquisition by said Shasta Plywood, Inc. is unknown to plaintiffs.

XI.

An actual controversy has arisen and now exists, between the plaintiffs on one side and the defendants on the other, as to the meaning and effect and application of the above quoted provisions of said contract relating to the measuring and scaling of the logs and the method of computing and determining the cost of said cedar logs.

Plaintiffs contend that the "common cost" therein referred to, of all species derived from the La Tour timber should, under the true meaning of said provision, be computed on the net scale of all the logs of all species, after deduction and allowance for all visible defects as set forth in said cutting contract.

Defendants contend that such "common cost," under the true meaning of said provision, should be computed on the gross scale of all logs of all species, before deduction and allowance for said defects.

XII.

As at the date of the filing of this Complaint, the difference in the amount which plaintiffs are required to pay under said differing and disputed constructions of said provisions, amounts to upwards of $35,000.00, and will steadily increase throughout the life of said contract so long as the timber cutting operations continue.

XIII.

Plaintiffs are ready, able and willing to pay the correct amount due for the cedar logs delivered and to be delivered to them; but the parties have been unable to agree as to the computation of such amount. As the operations under said contract continue, the amount of the difference between the parties will increase, and plaintiffs are faced with the dilemma of (1) either paying the amounts claimed by the defendants, which are and will continue to be substantially larger than the amounts contended by said defendants to be owing by them; or (2) being at the hazard of being in default under said contract, with the consequent danger of cancellation by defendants, and forfeiture of plaintiffs' rights under said contract, or of a large, undetermined and contingent liability of plaintiffs in the additional amount claimed and to be claimed by defendants, which will make impossible the rendition of proper and reliable statements, the keeping of proper, correct and reliable records, and the rendition of proper and correct tax returns and statements to the United States Government and other taxing authorities.

XIV.

Irreparable injury will occur to plaintiffs unless the rights and duties of the parties under said contract and said quoted provisions thereof are determined, in that plaintiffs face the hazard of forfeiture of their rights under the contract, with

consequent loss of their large investment in sawmill facilities in the vicinity of the timber supply, as well as loss of an assured supply of timber for upwards of twelve years.

There is also the danger multiplicity of actions faced by plaintiffs unless said controversy is determined; in that they face the hazards of: (1) demand by defendants for arbitration under the arbitration provision of said contract hereinafter referred to; (2) proceedings to compel such arbitration; (3) an action or actions to declare terminated the rights and interests of plaintiffs under said contract; (4) an action or successive actions by defendants or one of them to recover the additional amounts claimed by them to be due; (5) an action or successive actions for damages by defendants against plaintiffs, by reason of the claim by defendants that plaintiffs will have breached the contract; (6) other and incidental controversies and litigation over tax liability that will hinge upon the determination of this dispute.

By reason of the facts above stated, this is a proper case for relief in equity, by injunction.

XV.

In said contract it is provided among other things as follows:

"It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to

this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

Defendants threaten to attempt to compel such arbitration proceedings, notwithstanding the said provision of said contract saving to the parties the right to seek injunctive relief. If plaintiffs are compelled to proceed to such arbitration they will be denied their day in court and the expressly reserved right to injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract, and will thereby be irreparably injured by being forced to accept the award of arbitrators rather than the decree of a court of equity after a hearing and determination according to law.

XVI.

Plaintiffs are ready, able and willing and hereby offer to do equity, and perform the contract as the same may be interpreted by the Court herein.

Wherefore, plaintiffs pray the decree of the above-entitled Court determining and declaring the rights and duties of the parties under said contract, and particularly the true meaning, effect and application

of the said quoted provisions thereof with respect to the definition of actual cost of said logs, and settling and determining said controversy; and that defendants and each of them be enjoined from: (1) commencing other actions or proceedings pending determination of this action, to enforce or recover their claimed rights under the matter in controversy; (2) proceeding or attempting to proceed to arbitration or to compel plaintiffs to submit thereto; (3) cancelling or attempting to cancel or declare forfeit the rights and interests of the plaintiffs under said contract by reason of any claimed default resting in defendants' contentions as to the matter in controversy, above set forth; and for plaintiffs' costs, and for such other and further relief as may be meet and proper and in accordance with equity.

BRUNER & GILMORE,
McKEE, TASHEIRA & WAHRHAFTIG, RIDLEY STONE,
Attorneys for Plaintiffs.

State of California,
County of Alameda—ss.

Francis M. Neall, being first duly sworn, deposes and says: That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information

and belief, and as to those matters he believes it to be true. That said affiant is an officer of the plaintiff Elkins Sawmill Incorporated, a corporation, to-wit, its President; that he has charge and knowledge of the business thereof, and that he makes this affidavit and verification on behalf of said plaintiff.

FRANCIS M. NEALL.

Subscribed and sworn to before me this 4th day of August, 1949.

[Seal] J. D. COOPER,
Notary Public in and for the County of Alameda, State of California.

Exhibit "A" to Exhibit No. 1

Agreement made and entered into this 9th day of December, 1947, by and between United States Plywood Corporation, a New York corporation with its principal office at 55 West 44th St., New York City, New York (hereinafter sometimes called "U. S. Plywood") and Hudson Lumber Company, a Delaware corporation with its principal office at San Leandro, California (hereinafter sometimes called "Hudson")—

Witnesseth:

Whereas, U. S. Plywood, in conjunction with Harbor Plywood Corporation, a Delaware Corporation, hereafter referred to as "Harbor," has acquired approximately 1,000,000,000 feet of timber

(pine, incense cedar and other species) located in Shasta County, California, a portion of said timber being under outright purchase agreement subject to a deed of trust, and a portion under what is commonly known as a cutting contract (all of said timber is hereafter sometimes referred to as the "La Tour timber"); a copy of said cutting contract, included in the option agreement and cutting contract entered into on October 29, 1947, between Louise Defenbacher et al, as Seller, and La Tour Peak Timber Company, a California Corporation, and Harbor, has been delivered to and is in possession of Hudson and shall be deemed a part of the agreement; and

Whereas, U. S. Plywood has acquired from Harbor a one-half interest in the La Tour Timber and has agreed with Harbor upon the joint logging thereof, which logging operations will, subject to certain conditions, be done under Harbor's supervision; and

Whereas, pursuant to agreement between Harbor and La Tour Peak Timber Company, dated May 21, 1947, Harbor and U. S. Plywood are required to pay to La Tour Peak Timber Company, in addition to the stumpage charge specified in the aforesaid contract, an overriding royalty on incense cedar of 50c per m; and

Whereas, Hudson desires to purchase and U. S. Plywood desires to sell all of the incense cedar derived from the La Tour timber;

Now, therefore, for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations by each of the parties to the other in hand paid, and the mutual covenants and conditions herein contained, it is mutually agreed as follows:

1. U. S. Plywood undertakes and agrees to perform all of the terms and conditions of the cutting contract and not to permit or suffer any default thereunder, and further undertakes and agrees not to permit or suffer any default under the deed of trust securing the payment of the balance of the purchase price due for the outright purchase.

2. (a) U. S. Plywood agrees to sell and deliver to Hudson, as same are logged, and Hudson agrees to buy all merchantable incense cedar logs derived from the La Tour timber during the period hereinafter provided.

(b) The merchantability of logs shall be determined in the manner specified in the aforesaid cutting contract.

(c) Hudson shall pay for said logs Harbor's and U. S. Plywood's actual cost of such logs, as hereinafter defined, plus 10% of such cost.

3. (a) The cost of logs is defined, for the purpose of this contract, as the aggregate of the following items of expense of Harbor and U. S. Plywood.

(i) The stumpage charge payable by Harbor and U. S. Plywood for all cedar timber in the La

Tour timber computed on the basis set forth in the cutting contract above referred to, plus the amount of 50c per M ft.

(ii) The actual cost to Harbor and U. S. Plywood of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as Hudson may direct, whether done by Harbor or U. S. Plywood or under contract by an independent logger or loggers, provided that the destination of Hudson's logs shall be substantially adjacent to the destination of the remaining logs cut from the La Tour timber; and provided, further, that no logging or road-building profit of any Company which is a subsidiary of or affiliated with Harbor or U. S. Plywood shall be allowed in computing Hudson's cost hereunder.

(iii) The proportionate cost per M ft. of all necessary logging roads;

(iv) In the event that Harbor and U. S. Plywood elect to contract the logging, U. S. Plywood shall be entitled to add as an item of cost, as herein defined, the actual expense of a superintendent and electrical assistants to oversee such logging operations.

(v) All other costs incident to (according to usual and accepted accounting practice) and properly chargeable to cost of logs, including (without being limited thereto) provision for fire fighting

and equipment for so doing, interest at the rate of 4% per annum on the deposit payment on the cutting contract and taxes;

(vi) With the exception of the stumpage charge payable pursuant to subdivision (i) hereof, logging costs, as hereinabove defined, shall be computed on a common cost per M ft. for all species derived from the La Tour timber and this common cost will be the cost per M ft. of cedar logs delivered to Hudson hereunder.

(b) U. S. Plywood agrees in cooperation with Harbor, to keep the cost of logging as low as possible consistent with sound operation.

(c) U. S. Plywood agrees to cause Harbor to keep and maintain books of account according to usual and accepted accounting practices, which shall reflect the cost as herein defined, said books to be open for inspection by Hudson.

(d) The cost of logs, as above defined, shall be tentatively determined each month by Harbor's accounting department and settlement made on such tentative determination within ten (10) days after receipt of Harbor's statement for all logs theretofore sold and delivered to Hudson. The cost of logs shall be finally determined by Price, Waterhouse & Co., certified public accountants (or such other independent certified public accountants as Harbor may select to make the annual audit of all its business and affairs) according to usual and accepted

accounting practice. Determination of all costs, other than stumpage charge, shall be made at the close of each calendar year. The determination of the stumpage charge shall be made when the same is established pursuant to the provisions of the cutting contract. Determination of cost of logs by said certified public accountants shall be final and binding upon the parties hereto. If such certified public accountants shall find a substantial variation from the tentative determination, they shall give both parties hereto an opportunity for conference and discussion before issuing their final written determination. Settlement between the parties for any balance due by one to the other shall be made within 20 days after the receipt of the accountant's final determination.

(e) Under the present agreement between Harbor and U. S. Plywood relative to the La Tour Timber, Harbor is charged with the management of operations thereunder. In the event that for any reason U. S. Plywood shall assume the management of such operation, then and in such event U. S. Plywood shall be substituted for Harbor wherever the name of Harbor appears in this paragraph and the accounting firm of Arthur Andersen & Co., or such other independent certified public accountants as U. S. Plywood may select to make the annual audit of all its business and affairs shall be substituted for Price, Waterhouse & Co. and for Harbor's independent certified public accounting firm.

(f) Subject to procuring the consent of La Tour

Peak Timber Company and the parties of the first part to the cutting contract to the amendment of the terms and provisions of the cutting contract necessary to permit same, which consent U. S. Plywood will endeavor in good faith to procure in cooperation with Hudson, Hudson may, from time to time, request that the falling of cedar trees in certain designated areas be deferred to permit adjustment of the in-put of logs to the productive capacity of its mill, until such time as the quantity of standing cedar, the cutting of which has been so deferred, aggregates 3,000,000 feet and no more. Hudson agrees that it will promptly pay the full price of the stumpage, the cutting of which is thus deferred, plus the override of 50c per M ft., and assume all carrying charges on the land upon which the cedar trees may be left. It shall be the right and obligation of Hudson to log and remove the cedar, the cutting of which is thus deferred, at its own cost and expense, prior to the expiration of Harbor's or U. S. Plywood's rights under the cutting contract or under the outright purchase contract as the case may be. Hudson assumes all responsibility for any damage to or deterioration of the trees, the cutting of which has been deferred pursuant to its request as above stated, and any loss suffered by reason of its failure to remove the timber.

4. Nothing herein shall be deemed to preclude U. S. Plywood from exercising any option to suspend operations under the cutting contract as permitted therein.

5. U. S. Plywood undertakes and agrees that all logging operations shall be carried out in a good and workmanlike manner, observing all the good usages and customs as practiced in the logging industry on privately owned lands in the locality, not inconsistent with the specific terms of the cutting agreement above referred to. All logging operations shall be carried out in a manner to comply with all governmental regulations in effect from time to time. U. S. Plywood undertakes and agrees that all logs delivered to Hudson hereunder shall be free from any and all claims, liens or demands of any nature whatsoever.

6. Each of the parties agrees to use its best efforts to coordinate their operations hereunder to their mutual advantage.

7. (a) All obligations and deliveries hereunder shall be subject to acts, requests or demands of the Government of the United States and of the State of California, including any municipal subdivision thereof, wherein such delivery or shipment is to be made, and of any qualified board, commission or bureau or department thereof, and all rules and regulations pursuant thereto adopted or approved by said government or by any such state, or by any such board, commission or bureau or department thereof.

(b) U. S. Plywood shall not be liable for delay, non-delivery or failure or inability to deliver logs hereunder occasioned by acts of God, war, civil

commotions, fire, earthquakes, floods, snow, storms, strikes, lockouts or labor disturbances, or from any other cause whatsoever whether similar to the foregoing or not, beyond its control.

(c) If by reason of the happening of any of the events enumerated in subdivision (b) hereof, or for any other cause whatsoever, beyond its control, Hudson's ability to accept delivery of logs or U. S. Plywood's ability to make delivery is interfered with, then and in such event, Hudson's obligation to accept and pay for logs shall not be affected, provided, however, that all such logs shall be cold-decked at some location in the timber adjacent to the highway with an appropriate adjustment for any decrease or increase in cost caused by such action and Hudson shall have the right to effect removal thereof at its own cost. In addition, upon the happening of such events, U. S. Plywood will, upon Hudson's request and subject to the consent of La Tour Peak Timber Company and the parties of the first part to the cutting contract, as specified in subdivision (f) of Clause "3" hereof (which U. S. Plywood will endeavor in good faith to procure in cooperation with Hudson) and subject to all of the terms and provisions of said subdivision (f) except the limitation as to the quantity of 3,000,000 feet, defer the cutting of cedar trees and will at all events take such actions as are legally and economically feasible to reduce the production of cedar logs. U. S. Plywood un-

dertakes and agrees that in the event that Hudson's ability to receive logs pursuant to this contract is interfered with by reason of any of the causes specified in subdivision (b) hereof, it will cooperate with Hudson to the fullest practicable extent so as to ameliorate Hudson's obligations hereunder, provided, however, that nothing herein shall be understood to impose upon U. S. Plywood the obligation to undertake a course of action which will impose loss or damage upon it.

(d) It is specifically understood and agreed that U. S. Plywood shall be relieved of all obligations hereunder in the event of the destruction of the La Tour timber by fire or otherwise during the terms of this agreement.

8. In the event that either of the parties hereto shall file a voluntary petition in bankruptcy or shall make an assignment for the benefit of creditors, or shall be adjudicated a bankrupt, or upon the filing of a voluntary or the approval of an involuntary petition for reorganization or arrangement under the National Bankruptcy Act, or in the event of the appointment of a receiver or a temporary receiver of either of the parties and the failure to vacate same within sixty (60) days after such appointment, then and in any such event the other party may terminate this agreement by notice to that effect and thereupon all obligations except the obligations of Hudson to make payment of any amount due hereunder shall cease.

9. Any waiver by any of the parties hereto of any breach of the provisions of this agreement shall be limited to such particular instance, and shall not operate as a waiver of or be deemed to waive any future breaches of any of such provisions.

10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement.

11. It is specifically understood and agreed that except with U. S. Plywood's written consent, Hudson shall not assign or transfer the whole or any portion of its rights hereunder, to any other person, firm or corporation, except to a wholly owned subsidiary or to Elkins Sawmill Incorporated, a California corporation. Such assignment, however, shall not release Hudson from the obligations assumed by it hereunder. Except with Hudson's written consent, U. S. Plywood shall not assign or transfer the whole or any portion of its rights hereunder to any other person, firm or corporation, except to a subsidiary of U. S. Plywood, or to a corporation con-

trolled by U. S. Plywood or by U. S. Plywood and Harbor, but such assignment shall not release U. S. Plywood from the obligations assumed by it hereunder.

12. This contract shall commence as of the date that Harbor or U. S. Plywood commences logging operations on the La Tour Timber and shall continue in full force and effect for the full term of the cutting contract hereinabove referred to and any extensions or renewal thereof, but in no event for more than twenty-five (25) years after the commencement of logging operations on the La Tour timber.

13. Any notice required or permitted to be given under the provisions of this contract shall be given as follows:

(a) To U. S. Plywood at 55 West 44th Street, New York City, New York, or such other address as it may from time to time in writing designate.

(b) To Hudson Lumber Company at its San Leandro Office, California, or such other address as it may from time to time in writing designate.

14. The execution, operation, performance and all other matters pertaining to this contract shall be construed under and governed by the laws of the State of California.

15. This contract shall be binding upon the parties hereto, their respective successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

UNITED STATES PLYWOOD CORPORATION,

By /s/ LAWRENCE OTTINGER,
President.

HUDSON LUMBER COMPANY,

By /s/ FRANCIS M. NEALL,
General Manager.

State of New York,
City and County of New York—ss.

On this 12th day of December, 1947, before me, John Pardo, a Notary Public in and for the City and County of New York, State of New York, residing therein, duly commissioned and sworn, personally appeared Lawrence Ottinger, known to me to be the President of United States Plywood Corporation, the corporation described in and that executed the within and foregoing Agreement and also known to me to be the person who executed the same on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City

and County and State aforesaid, the day and year in this certificate first above written.

/s/ JOHN PARDO,
Notary Public.

(Stamp) John Pardo, Notary Public, State of New York. Residing in Bronx County.

Commission expires March 30, 1949.

State of New Jersey,
City of Jersey City, County of Hudson—ss.

On this 12th day of December, 1947, before me, G. H. Hubbard, a Notary Public in and for the County of Hudson, State of New Jersey, residing therein, duly commissioned and sworn, personally appeared Francis M. Neall, known to me to be the General Manager of Hudson Lumber Company, the corporation described in and that executed the within and foregoing Agreement and also known to me to be the person who executed the same on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County and State aforesaid, the day and year in this certificate first above written.

/s/ G. H. HUBBARD,
Notary Public.

(Stamp) G. H. Hubbard, Notary Public of New Jersey.

My commission expires June 17, 1951.

Form 1 No. 83407

State of New York,
County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify That John Pardo whose name is subscribed to the annexed affidavit, deposition, certificate or acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, has been filed in my office: that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgement or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal this 16th day of Dec., 1947.

/s/ ARCHIBALD R. WATSON,
County Clerk and Clerk of the Supreme Court,
New York County.

Fee Paid 25c.

Form 2479 No. 9177

State of New Jersey,
County of Hudson—ss.

I, W. H. Gilfert, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas for said County, said Courts being Courts of Record, with a seal, do hereby certify that G. H. Hubbard the Notary Public before whom the within acknowledgement or affidavit was made, was at the time of taking the same commissioned and sworn, and residents in said County, and duly authorized by the laws of the State of New Jersey to take for record in said State all affidavits and all acknowledgements and proofs of deeds of conveyance for lands, tenements, and hereditaments, situate, lying and being in said State of New Jersey. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe the signature to said certificate of proof or acknowledgement is genuine. And, further, that said instrument is executed and acknowledged according to the laws of the State of New Jersey.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County the 17th day of December, 1947.

W. H. GILFERT,
Clerk.

EXHIBIT B TO EXHIBIT NO. 1

Merchantability: The minimum merchantable log shall be a log which is ten feet or longer (or eight feet or longer as provided in paragraph 10) plus trim allowance and which is twelve inches or more in diameter inside the bark at the small end or which is ten inches or more in diameter at the small end if the top log is a smooth type log containing small live knots, and which shall scale 50% or more merchantable, as defined hereinafter, after customary deductions have been made from gross scale for visible defects. Deduction in scale shall be made for unfirm red and blue stain, rot, wind-shake and split, but no deduction in scale shall be made for firm red and blue stain or heavy massed pitch. Deduction for rot in cedar logs shall be based on the average of the end-areas of the defect in each scaling length, rather than on the larger end-area alone as is customary in scaling pine and fir logs. No deduction in scale shall be made for defect, deterioration or loss in volume or value due to any cause or condition within the control of the buyer, and losses resulting to felled timber from fire shall be paid for by the buyer.

Where cutting experience demonstrates that certain types of defective trees cannot produce 25% or more of their gross volume in merchantable scale seller shall designate such trees as in seller's reasonable opinion cannot produce such volume, to be left standing at buyer's option and buyer shall not be required to fall them.

The term "merchantable," as herein used, shall be defined to mean that portion of the log from which lumber can be produced which is merchantable as defined in Standard Grading Rules, published by Western Pine Association, effective April 15, 1947, copy of which is attached hereto, marked Exhibit B, and hereby made a part hereof, grading Number 5 common or Box or better.

[Endorsed]: Filed August 26, 1949.

In the District Court of the United States for the Northern District of California Southern Division

No. 29100 H

HUDSON LUMBER COMPANY, a Delaware corporation, and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION, a New York corporation, and SHASTA PLYWOOD, INC., a Nevada corporation, FIRST DOE, SECOND DOE AND FIRST DOE COMPANY, a corporation,

Defendants.

MOTION TO DISMISS OR IN ALTERNATIVE TO STAY ACTION

I.

The defendants, United States Plywood Corporation and Shasta Plywood, Inc., move to dismiss the action on the ground that it appears on the face of the complaint:

1. That the complaint fails to state a claim upon which relief can be granted;

2. That the Court has no jurisdiction of the subject matter; in that this action has been brought by the above-named plaintiffs for the construction and determination of the rights and duties of the

parties under a written contract attached to plaintiffs' complaint as Exhibit "A", which contract contains an agreement in writing for arbitration covering issues as to the construction of said contract or the determination of the respective rights and liabilities thereunder, the provision thereof reading as follows:

"It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

II.

In the alternative, in the event the motion to dismiss is not granted, the defendants, United States Plywood Corporation and Shasta Plywood, Inc., pursuant to the provisions of 9 U. S. C. A., Section 3, move for a stay of all proceedings in this action until arbitration can be had pursuant to said agreement and Sections 1280 to 1293 inclusive of California Code of Civil Procedure, on the grounds set forth in Paragraph I above.

III.

This motion will be based upon this notice, upon the complaint on file in this action and upon the affidavit of M. A. Marquis, one of counsel for defendants, hereto attached.

McMICKEN, RUPP &
SCHWEPPE,

/s/ M. A. MARQUIS,
PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE M. PRINCE,
Of Counsel for Defendants, United States Plywood Corporation and Shasta Plywood, Inc.

NOTICE OF MOTION

To Bruner & Gilmore and McKee, Tasheira & Wahrhaftig, Ridley Stone, Attorneys for Plaintiffs:

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 276, United States Post Office and Courthouse Building, San Francisco, California, on the 19th day of September, 1949, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

McMICKEN, RUPP & SCHWEPPE,

/s/ M. A. MARQUIS,
PILLSBURY, MADISON & SUTRO,

/s/ EUGENE M. PRINCE,
Of Counsel for Defendants, United States Plywood Corporation and Shasta Plywood, Inc.

Service of the within and foregoing motion with attached affidavit, proposed draft of orders and statement of reasons in support of motion admitted at Oakland, California, this .... day of ....., 1949.

....,
Of Counsel for Plaintiffs.

State of Washington,
County of King—ss.

M. A. Marquis, being first duly sworn, on oath deposes and says:

That he is one of counsel for defendants, United States Plywood Corporation and Shasta Plywood, Inc., in the above-entitled matter; that this affidavit is made in support of motion to dismiss this action or in alternative to stay action, to which motion this affidavit is attached;

That plaintiffs have made no demand or request for arbitration in accordance with the provisions of the arbitration clause in the contract involved in this action, which arbitration clause is set forth in full in said motion and, in fact, the plaintiffs have affirmatively alleged in their complaint that "defendants threatened to compel arbitration proceedings" and the plaintiffs seek to enjoin such proceedings; that the defendants, United States Plywood Corporation and Shasta Plywood, Inc., are ready and willing to proceed with arbitration of the issue involved in this proceeding;

That, as alleged in plaintiffs' complaint, Harbor Plywood Corporation, has relinquished all interest in the timber which is the subject of the contract attached to plaintiffs' complaint as Exhibit "A" and

Harbor Plywood Corporation is not now involved in said agreement in any manner.

/s/ M. A. MARQUIS.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ JANE CARMODY,
Notary Public in and for the State of Washington, residing at Seattle.

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

This Cause coming on to be heard on motion of defendants, United States Plywood Corporation and Shasta Plywood, Inc., for an order dismissing this action or in the alternative for an order staying proceedings in this action, and it appearing to the Court that said action involves an issue referable to arbitration under an agreement in writing for such arbitration, and plaintiffs have made no request or demand for such arbitration,

It Is Ordered that this action be and it is hereby dismissed.

Dated this ..... day of September, 1949.

....., United States District Judge.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF ACTION

This Cause came on to be heard on motion of defendants, United States Plywood Corporation and Shasta Plywood, Inc., for an order dismissing this action or in the alternative for an order staying proceedings in this action, and it appearing to the Court that said action involves an issue referable to arbitration under an agreement in writing for such arbitration, and that plaintiffs have made no request or demand for such arbitration;

It Is Ordered That this action be and it hereby is stayed, and that plaintiffs and their attorneys be and they hereby are stayed from taking further action in this case until arbitration has been had in accordance with the terms of the agreement between the parties hereinabove referred to.

Dated this ..... day of September, 1949.

.....,

United States District Judge.

[Endorsed]: Filed September 1, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS M. NEALL IN OPPOSITION TO MOTION OF DEFENDANTS TO DISMISS OR STAY

State of California, County of
Alameda, Northern District of California—ss.

Francis M. Neall, being first duly sworn, deposes and says: I am President of Elkins Sawmill Incorporated, a corporation, one of the plaintiffs in the above entitled action. As such I made the affidavit of verification of the Complaint on file herein. I am the Manager of the plaintiff, Hudson Lumber Company, a corporation, and have charge of its office and yard at San Leandro, California, and am in direct charge of its business and operations. I personally participated in and carried on, and have knowledge of the negotiations leading up to the making of the contract between United States Plywood Corporation and Hudson Lumber Company, dated December 9, 1947, a true copy of which is attached to the Complaint in this action and marked "Exhibit A". I also participated in the drafting and discussion of the provisions of said contract. I also have personally participated in and have knowledge of the negotiations between the plaintiffs and defendants herein, prior to the commencement of this action, concerning the controversy between them which is referred to in said Complaint, as to the interpretation of said contract with regard to

the method of computing the actual cost of logs delivered to plaintiffs pursuant to said contract.

The price provided by said contract to be paid by the plaintiffs for the cedar logs purchased is based on the "cost" of the logs, and such "cost" includes, among other items, the actual logging cost of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as said Hudson Lumber Company may direct. The contract further provides that such logging costs shall be computed on a "common cost" per 1000 feet for all species of logs derived from the timber tract referred to in the contract, and this "common cost" is to be the cost per 1000 feet of the cedar logs. The controversy between plaintiffs and defendants revolves about the point whether this "common cost" of all species should be computed on the net scale of all the logs of all species, after deduction and allowance for visible defects (as plaintiffs contend); or whether it should be computed on the gross scale of all the logs of all species, before deduction and allowance for visible defects. The reason why computing such common costs on a net scale makes a substantial difference from computing it on a gross scale, is that the different species of logs ordinarily have a different percentage or portion of visible defects, and that cedar logs have a higher percentage of such defects than other species. Therefore, the proportion of usable wood derived from cedar logs is less than that derived from other species. It follows

that any given total amount of logging costs, spread as a "common cost" over all species, will bear less heavily on the cedar logs if a net scale is used, than if a gross scale is used.

During the negotiations leading up to the making of said contract, and during the drafting thereof, Raymond T. Heilpern, Esq., acted as counsel for said United States Plywood Corporation and as such participated in said negotiations and in the drafting of said contract. He drafted Paragraph 10 of said contract, relating to arbitration; and it was at his instance and insistence that there was drawn and worded by him and inserted in said Paragraph 10, the clause at the end thereof which reads as follows:

". . . but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

During said negotiations prior to the commencement of this action, concerning said controversy, said Raymond T. Heilpern, Esq., among others, acted as counsel for defendants, and A. W. Bruner, Esq., among others, acted as counsel for plaintiffs. On or shortly prior to August 4, 1949, there was received by the office of said A. W. Bruner, Esq., a letter from said Raymond T. Heilpern, Esq., concerning the said matter in controversy, which letter, in the absence of said A. W. Bruner, Esq., from his office, was immediately exhibited and referred to this affiant by an associate of said A. W. Bruner, Esq. Said letter is in words and figures as follows:

"Judge A. W. Bruner
Bruner & Gilmore, Esqs.
San Leandro, Calif.

Dear Judge Bruner:

Your letter of July 21, 1949 to Shasta Plywood Corporation has been referred to me.

As you may know, I participated in the negotiations leading to the making of the agreement of December 9, 1947, between Hudson Lumber Company and United States Plywood Corporation. In my opinion, the statements submitted by Shasta Plywood Corporation, pursuant to the contract, and the audit of Arthur Anderson & Co. were correctly prepared in conformity with the provisions of the agreement.

Further, pursuant to paragraph "3" of the contract with Hudson Lumber Company, the determination of the cost of logs by Arthur Andersen & Co. is final and binding upon both parties to the agreement. Under the circumstances, I must insist, on behalf of my client, that Hudson Lumber Company make prompt payment of the balance due, representing the difference between the amount actually paid by it and the contract price of the logs delivered, as established by the audit made by Arthur Andersen & Co.

If the parties to the agreement are unable to settle amicably their differences, such dispute can, of course, be arbitrated as provided in paragraph "10" of the contract. However, pending such arbitration,

it is expected that your client will pay all invoices at the time and in the manner specified in the contract.

Very truly yours,

/s/ RAYMOND T. HEILPERN."

RTH:FP

Immediately following receipt of such letter, plaintiff's counsel herein prepared and filed on August 4, 1949, the Complaint in this action.

/s/ FRANCIS M. NEALL.

Subscribed and sworn to before me this 13th day of October, 1949.

[Seal] /s/ JACQUELINE DITTO,
Notary Public in and for the County of Alameda, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

State of New York,
City of New York, County of New York—ss.

Raymond T. Heilpern, being duly sworn, deposes and says:

That he is an attorney-at-law, duly admitted to practice in the Courts of the State of New York, and has his office at No. 225 Broadway, in the Borough of Manhattan, City of New York. That he is the Raymond T. Heilpern referred to in the affidavit of Francis M. Neall submitted in opposition to the above-named defendants' application for a stay.

It is true, as stated in said affidavit, that deponent, in conjunction with said Francis Neall, drafted the contract between United States Plywood Corporation and Hudson Lumber Company, dated December 9, 1947, which is the subject matter of this action. The facts, however, with reference to the precise language contained in paragraph "10" of said agreement relating to arbitration, are materially at variance with those set forth in Mr. Neall's affidavit.

Deponent has in his files the first draft of said agreement. The arbitration clause, as contained in the draft, was originally dictated by deponent and it stopped with the phrase "pursuant to the rules of the American Arbitration Association as then in effect". A copy of this original draft was delivered by deponent to Mr. Neall during the course of the negotiations and Mr. Neall submitted it,

according to his then statement to deponent, to Mr. Eugene Untermyer, counsel in New York for Eagle Pencil Company and the plaintiff, Hudson Lumber Company; Eagle Pencil Company, directly or indirectly, according to the information furnished to deponent, controls the Hudson Lumber Company.

A day or so after the preparation of the original draft, Mr. Neall came to deponent's office with his copy of the draft, and certain amendments thereto which he said had been proposed by Mr. Untermyer. Included in those amendments was the addition to paragraph "10," reading as follows:

"but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

This provision, which appears in shorthand on the first draft of the agreement, which is in deponent's possession, was dictated by Mr. Neall in deponent's office to deponent's then secretary.

In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration

proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury.

As stated above, the language of this modifying clause to the arbitration provision was suggested by Mr. Neall, purportedly as the result of his conference with his attorney, Mr. Eugene Untermyer, and was not deponent's.

/s/ RAYMOND T. HEILPERN.

Sworn to before me, this 14th day of October, 1949.

/s/ DEBORAH NEMETZ,

Notary Public, State of New York, Residing in New York County.

Commission Expires March 30, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

ORDER

Defendant's Motions to Dismiss and to Stay Proceedings having been briefed, argued, and submitted for ruling,

It Is Ordered that the Motion to Dismiss be and the same hereby is Denied, and Motion to Stay be and the same hereby is Granted, pending arbitration by the parties in accordance with the provisions of the contract in dispute.

Date:

/s/ GEORGE B. HARRIS,
U. S. District Judge.

Evans v. Hudson Coal Co., 165 Fed. 2d 970;
Shanferoke Co. v. Westchester Co., 293 U. S. 449;
Kulukundis v. Amtorg Trading Corp., 126 Fed. 2d. 978.

[Endorsed]: Filed Nov. 9, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the Order made and filed herein on November 9, 1949, granting the defendants' Motion to Stay proceedings, said portion of said Order being that portion providing as follows:

"It Is Ordered that the . . . Motion to Stay be, and the same hereby is, Granted, pending arbitration by the parties in accordance with the provisions of the contract in dispute."

Dated: December 1, 1949.

BRUNER & GILMORE,
McKEE, TASHEIRA and
WAHRHAFTIG,

/s/ RIDLEY STONE,

Attorneys for Appellants, Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation.

[Endorsed]: Filed December 1, 1949.

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

The Appellants in the above-entitled action, Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1) Complaint for Declaratory Relief and for Injunction filed herein with the Petition for Removal of the Cause on August 26, 1949, and attached to said Petition for Removal of the Cause as Exhibit 1 thereto, together with the exhibits attached to said Complaint designated Exhibit "A" and Exhibit "B."

2) Motion to Dismiss or in the Alternative to Stay Action, together with Notice of said Motion attached thereto, and together with the Affidavit of M. A. Marquis dated August 29, 1949, attached thereto; all thereof having been filed herein on September 1, 1949.

3) Affidavit of Francis M. Neall in opposition to Motion of Defendants to Dismiss or Stay, dated October 13, 1949, filed herein on October 17, 1949.

4) Affidavit of Raymond T. Heilpern, dated Oc-

tober 14, 1949, and filed herein on October 17, 1949.

5) Order of the above-entitled Court denying Motion to Dismiss and Granting Motion to Stay, made and filed herein on November 9, 1949.

STATEMENT OF POINTS

A) The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of Section 3 of the United States Arbitration Act (9 U.S.C.A. Sect. 3), in that the arbitration clause found in Paragraph 10 of the contract agreement attached as Exhibit A to the Complaint saves to the parties thereto the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

B) This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

C) The Defendants and Appellees have waived whatever right they may have had to insist on prior arbitration as a condition precedent to litigation.

D) The Court erred in staying the action pending arbitration by the parties in the face of said saving clause reserving to the parties the right to seek "injunctive relief to prevent irreparable in-

jury by reason of a claimed breach" and in the face of said waiver by defendants and appellees.

Dated: December 2, 1949.

BRUNER & GILMORE.
McKEE, TASHEIRA &
WAHRHAFTIG.

/s/ RIDLEY STONE,

Attorneys for Appellants: Hudson Lumber Company, a Delaware Corporation, and Elkins Sawmill Incorporated, a California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 3, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Petition for Removal of Civil Action from the Superior Court of the State of California, in and for the County of Alameda, to the District Court of the United States, for the Northern District of

California, Southern Division, Contains a copy of Summons and Complaint for Declaratory Relief and for Injunction—Exhibit 1—and Copy of Contract—Exhibit "A" to Exhibit 1 and copy of provision relating to merchantability of logs—Exhibit "B" to Exhibit 1.

Motion to Dismiss or in Alternative to Stay Action.

Affidavit of Francis M. Neall in Opposition to Motion of Defendants to Dismiss or Stay.

Affidavit of Raymond T. Heilpern.

Order Denying Motion to Dismiss and Granting Motion to Stay.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Appellants' Designation of Portions of Record, Proceedings and Evidence to Be Contained in Record on Appeal and Statement of Points.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of December, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12429. United States Court of Appeals for the Ninth Circuit. Hudson Lumber Company, a Corporation, and Elkins Sawmill Incorporated, Appellants, vs. United States Plywood Corporation and Shasta Plywood, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12429

HUDSON LUMBER COMPANY, et al.,
Appellants.

vs.

UNITED STATES PLYWOOD CORPORATION, et al.,
Appellees.

STATEMENT OF POINTS AND DESIGNATION OF RECORD (RULE 19 (6))

To the Clerk of the above-entitled Court:

Agreeably to the provisions of your Rule 19 (6), the Appellants Hudson Lumber Company and Elkins Sawmill Incorporated, hereby submit the following statement of the points on which Appellants intend to rely, and the following designation of all of the record which is material to the consideration of the appeal:

Statement of Points

(Question: Where parties to a contract for the sale of incense cedar logs dispute its meaning as to the computation of the price, and the purchaser sued for declaratory relief and to enjoin the seller from cancelling the contract or from bringing other actions, or attempting to arbitrate, alleging that purchaser faces the dilemma of either paying the

substantially larger sums claimed by seller or running the risk that seller will cancel or refuse performance, to purchaser's irreparable injury, on the claim that purchaser has breached the contract: Was the District Court right in staying the action pending arbitration, on the basis of the contract provision requiring arbitration of all disputes thereunder, but further providing that "nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement"?)

Points:

1. The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of 9 U. S. C. A. Sect. 3, because the contract saves to the parties thereto the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

2. This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract;

(a) Unless the Appellants continue to pay the substantially larger sums demanded by the Appellees, the Appellants fear that the Appellees will purport to cancel or refuse performance contending that Appellants have breached the contract;

(b) Such cancellation or refusal of performance, would, if Appellees are wrong in their construction of the contract, constitute a breach on their part

by Appellees and would cause irreparable injury to the Appellants;

(c) Cancellation or refusal of performance under such circumstances by the Appellees will cause the loss of a substantial investment and an assured supply of cedar timber; damages would be difficult to ascertain and inadequate; and multiplicity of actions and proceedings may result unless the relief sought by Appellants is granted; all to Appellants' irreparable injury;

(d) The actions for "injunctive relief" excluded by the contract from the arbitration provision include the usual equitable remedies of mandatory or prohibitive injunction and declaratory relief incidental thereto.

3. The Appellees have waived whatever right they may have claimed to insist upon prior arbitration as a condition precedent to this litigation.

4. In determining whether the issues are "referable to arbitration under an agreement in writing for such arbitration" and in determining the rights and duties of the parties, the contract is to be construed under and governed by the laws of California, by reason of its express provisions.

5. The District Court erred in staying the action pending arbitration by the parties, in the face of the saving clause reserving to the parties the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach", and in the face of such waiver by Appellees.

Designation of Record

The whoe of the certified typewritten Transcript of Record filed in the above entitled Court on December 15, 1949.

Dated: December 19, 1949.

BRUNER AND GILMORE,
McKEE, TASHEIRA &
WAHRHAFTIG,

/s/ RIDLEY STONE,

Attorneys for Appellants Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1949.

No. 12,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON LUMBER COMPANY (a corporation), and ELKINS SAWMILL INCORPORATED,

Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON LUMBER COMPANY (a corporation), and ELKINS SAWMILL INCORPORATED,

Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

STATEMENT DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND OF CIRCUIT COURT OF APPEALS.

A. Facts as disclosed by pleadings and record, which are the basis of jurisdiction.

1. Plaintiff Hudson Lumber Company is a corporation organized and existing under the laws of Delaware; plaintiff Elkins Sawmill Incorporated, under the laws of California; defendant United States Plywood Corporation, under the laws of New York;

and defendant Shasta Plywood, Inc., under the laws of Nevada. (Petition for Removal of Civil Action, paragraphs I and II, Transcript of Record, pages 3 and 4; Complaint, paragraphs I, II, III and IV, Transcript of Record, pages 9 and 10.)

2. This is a civil action for a declaratory judgment and injunction, and the matter in controversy, at the commencement of said action and at the present time, exceeds the sum or value of three thousand ($3,000.00) dollars, exclusive of interest and costs. (Petition for Removal of Civil Action, paragraph II, Transcript of Record, page 3; Complaint, paragraphs XI and XII, Transcript of Record, page 14.)

3. The portion of the Order of the District Court for the Northern District of California, appealed from, which stays the action pending arbitration between the parties is a "final decision" precluding appellants from the judicial remedies of declaratory relief and injunction and relegating them to the sole remedy of arbitration process (in which event Title 28, U.S.C.A., Section 1291 supports the appellate jurisdiction of the Circuit Court of Appeals); or it is an "interlocutory order" granting an injunction, under the principle announced in *Enelow v. N. Y. Life Insurance Co.* (1935) 293 U.S. 379, 79 L. ed. 440, 55 Sup. Ct. 310, and as reannounced with respect to arbitration proceedings in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.* (1935) 293 U.S. 449, 79 L. ed. 583, 55 Sup. Ct. 313; in which latter event the appellate jurisdiction is supported by Title 28, U.S.C.A., Section 1292(1).

B. Statutory provisions believed to sustain the jurisdiction.

1. Title 28, U.S.C.A., Section 1332, subdivision (a)(1):

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between:

(1) Citizens of different States;"

2. (a) Title 28, U.S.C.A., Section 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

(b) Or, in the alternative: Title 28, U.S.C.A., Section 1292(1)

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court".

STATEMENT OF THE CASE.

A. The question.

Where parties to a contract for the sale of incense cedar logs dispute its meaning as to the computation of the price, and the purchaser sues for declaratory relief and to enjoin the seller from cancelling the con-

tract, or from bringing other actions, or attempting to arbitrate, alleging that the purchaser faces the dilemma of either paying the substantially larger sums claimed by seller or running the risk that seller will cancel or refuse performance, to purchaser's irreparable injury, on the claim that purchaser has breached the contract: Was the District Court right in staying the action pending arbitration, on the basis of the contract provision requiring arbitration of all disputes thereunder, but further providing that "nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement"?

B. How the case arises.

The appellants (plaintiffs in the District Court), as buyer and successor in interest to buyer, respectively, are engaged in a controversy with the appellees (defendants in the District Court), as seller and successor in interest to seller, respectively, concerning the interpretation of that portion of a contract between them relating to the method of determining the cost of cedar logs, for the purchase and sale of which the contract was made.

(Contract, paragraph 3(a)(vi); Transcript of Record, page 23.)

The contract in question contains a provision requiring arbitration of any disagreements or differences thereunder, in the manner provided, but qualifies such provision in the following language:

"* * * but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

(Contract, paragraph 10, Transcript of Record, page 29.)

Appellants have contended throughout, and now contend, that they seek in this action, among other things, "injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement", squarely within the above quoted saving clause of the arbitration provision, in that: they ask the Court to enjoin appellees, among other things, from cancelling or attempting to cancel or declare forfeit the rights of appellants under the contract by reason of appellees' contention that appellants are in default under appellees' construction thereof. It is alleged in addition as a basis for injunctive relief, that unless the rights and duties of the parties are declared, appellants will be harassed by multiplicity of actions and proceedings, including arbitration proceedings, actions to forfeit appellants' rights, actions to recover money under the contract, actions for damages, and incidental controversies and litigation over tax liability that will hinge on the determination of the dispute. It is further shown that by threatening insistence on arbitration proceedings to settle the controversy appellees seek to deprive appellants of the right expressly reserved to the parties in the contract, to seek injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract. (See Complaint,

paragraphs XIV and XV, and the prayer thereof, Transcript of Record, pages 15 to 18.)

The action having been removed to the District Court from the California Superior Court (Alameda County) where it had been commenced (Transcript of Record, pages 2 to 36) the defendants moved in the District Court for an order dismissing the action, or in the alternative, for an order staying the action, on the ground that the contract provided for arbitration of disputes, and that arbitration had not been had. (Transcript of Record, pages 37 to 43.)

After hearing and submission of the alternative motions to dismiss or stay, the District Court denied the motion to dismiss, but granted the motion to stay, "pending arbitration by the parties in accordance with the provisions of the contract in dispute", as the Order expressed it. (Transcript of Record, page 52.)

This appeal is taken from the portion of said Order granting the motion to stay the action.

SPECIFICATION OF ERRORS RELIED UPON.

Appellants contend that the District Court erred in granting the motion to stay the action pending arbitration, in that:

1. Such stay deprives the appellants of the right, expressly reserved in the arbitration provision of the contract, to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract; and in that:

2. The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of Title 9, U.S.C.A., Section 3, because the arbitration provision saves to the parties the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract; and in that:

3. This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract, because:

(a) Unless appellants continue to pay the substantially larger sums demanded by appellees, appellants fear that appellees will purport to cancel or refuse performance, contending that appellants have breached the contract; and

(b) Such cancellation or refusal of performance would, if appellees are wrong in their construction of the contract, constitute a breach of the contract on their part by appellees and would cause irreparable injury to appellants; and

(c) Cancellation or refusal of performance under such circumstances by appellees will cause the loss of a substantial investment and an assured supply of cedar timber; damages would be difficult to ascertain, and inadequate; and multiplicity of actions and proceedings may result unless the relief sought by appellants is granted; all to appellants' irreparable injury; and

(d) The actions for "injunctive relief" excluded by the contract from the arbitration pro-

visions include the usual equitable remedies of mandatory or prohibitive injunction and declaratory relief incidental thereto;

and the District Court further erred in granting said stay in that:

4. The appellees have waived whatever right they may have claimed to insist upon prior arbitration as a condition precedent to this litigation.

ARGUMENT.

SUMMARY OF POINTS.

The stay of proceedings granted by the District Court was not warranted unless the issues involved are "referable to arbitration under an agreement in writing for such arbitration". Here, there is an agreement in writing providing for arbitration of "any disagreement"; but this general provision is qualified by an apparently inconsistent saving clause, reserving to the parties the right to "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the agreement. Arbitration being a remedial question, the arbitration provision is governed by the federal law; but it is necessary to consider it in the light of the substantive rights of the parties, which are governed by California law. The apparently inconsistent clauses of the arbitration provision must be reconciled and both given effect if that is reasonably possible. In doing this resort may be had to the intention of the parties as disclosed by their negotia-

tions leading to the contract. So doing, it is the fair and reasonable construction of the whole arbitration provision, that any controversy involving a question of law or a mixed question of law and fact, such as interpretation of the contract, directly involving forfeiture of the rights under the contract, and consequent irreparable injury, was reserved for action in a court of equity; while the general arbitration clause referred rather to determination of disputed facts in the light of which there would be no controversy or doubt as to the meaning of the contract or the rights of the parties—that is, the "arbitration" referred to is in the nature of mere "appraisal" or "measurement" or other fact finding. The issues in this case, involving legal questions and an interpretation of the meaning of the contract, and the right to an injunction against unwarranted repudiation of the contract, fall within the first category of matters reserved to actions for "injunctive relief to prevent irreparable injury by reason of a claimed breach", and are not arbitrable. Hence the issues here are not "referable to arbitration", and the stay was unwarranted. The Court, if it entertains the action to enjoin such repudiation, can give all incidental relief proper, including declaratory relief and injunction against attempts to compel unwarranted arbitration.

Furthermore, even if there had been an original right to compel arbitration of the issues here involved, appellees, by conduct inconsistent with arbitration, have waived whatever right they may have had to it.

THE FACTS.

As disclosed by the complaint (which sets forth the contract between the parties as an exhibit) and the affidavits in the record, the facts before the District Court are as follows:

1. The price to be paid by the appellants to the appellees for the cedar logs purchased is based upon the "cost" of the logs, which "cost" includes, among other items, the actual logging cost of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as appellant Hudson Lumber Company may direct. (Contract, paragraph 3 (a)(ii); Transcript of Record, page 22.)

2. Such logging costs shall be computed on a "common cost per thousand feet for all species of logs" derived from the timber tract, and this "common cost" will be the cost per thousand feet of the cedar logs. (Contract, paragraph 3 (a)(vi); Transcript of Record, page 23.)

3. The controversy between the parties revolves about the point whether this "common cost" of all species should be computed on the *net* scale of all the logs of all species, *after* deduction and allowance for visible defects (as appellants contend); or whether it should be computed on the *gross* scale of all the logs of all species, *before* deduction and allowance for visible defects (as appellees contend). (Complaint, paragraph XI; Transcript of Record, page 14.)

4. These differing formulae for computing "common cost" make a substantial difference in the cost of the cedar logs, because ordinarily the different species of logs have a different percentage or portion of visible defects. Cedar logs have a higher percentage of such defects than other species. Therefore, the percentage or portion of usable wood derived from cedar logs is less than that derived from other species. It follows that any given total amount of logging costs spread as a "common cost" over all species, will bear less heavily on the cedar logs if the quantity of wood in all the logs of all species is measured *after* deduction and allowance for visible defects, than if such quantity is measured *before* such deduction and allowance is made (that is to say, if a *net,* rather than a *gross,* scale is used). (Affidavit of Francis M. Neall, Transcript of Record, pages 44, 45 and 46.)

5. The difference in price resulting from these two formulae for computing costs amounts to upwards of $35,000.00 with respect to the logs delivered up to the time this action was commenced, and will steadily increase with further deliveries so long as operations continue under the contract. (Complaint, paragraph XII; Transcript of Record, page 14.)

6. The parties have expressly agreed that "the execution, operation, performance and all other matters pertaining to this contract shall be construed under and governed by the laws of the State of California". (Contract, paragraph 14; Transcript of Record, page 30.)

7. The full text of the arbitration provision in the contract is as follows:

> "It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."
>
> (Contract, paragraph 10; Transcript of Record, page 29.)

8. There is conflict in the record concerning at which party's instance there was included in the arbitration provision the saving clause reading:

> "* * * but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

The affidavit of Francis M. Neall states that such saving clause was inserted at the instance and insistence of Raymond T. Heilpern, who acted as counsel for appellee United States Plywood Corporation in the negotiation of the contract. (Transcript of Record, pages 44, 46.)

To the contrary, the affidavit of said Raymond T. Heilpern asserts that such saving clause was inserted at the instance of said Francis M. Neall, purportedly as the result of Mr. Neall's conference with the New York counsel for appellant Hudson Lumber Company. (Transcript of Record, pages 49-51.)

9. Whichever of these two gentlemen is correct in his recollection of the negotiations, Mr. Heilpern's affidavit on behalf of appellees states, among other things, as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury." (Transcript of Record, pages 50-51.)

10. If appellees rescind or cancel the contract or declare forfeit appellants' rights thereunder (that is to say, if appellees refuse further deliveries of cedar logs under the contract) by reason of appellants' failure to pay the larger amounts claimed by appellees and

by reason of appellees' contention that appellants would thereby breach the contract, and that further performance by appellees was thereby excused, appellants will lose a large investment in sawmill facilities in the vicinity of the timber supply, and will lose an assured supply of timber in excess of twelve years' supply. (Complaint, paragraph XIV; Transcript of Record, pages 15-16.)

11. Appellants face the danger of multiplicity of actions and proceedings unless the controversy is determined. (Complaint, paragraph XIV; Transcript of Record, pages 15-16.)

12. Appellees, prior to the commencement of this action, expressly declared that despite any arbitration proceedings they would insist on appellants' paying, pending the arbitration, the amounts claimed by appellees to be due. (Affidavit of Francis M. Neall, and letter therein set forth, from counsel for appellees to counsel for appellants; Transcript of Record, pages 44, 47-48.)

13. Appellants are ready, able and willing to do equity and to perform the contract as the Court shall interpret it. (Complaint, paragraph XVI; Transcript of Record, page 17.)

POINTS AND AUTHORITIES.

I. WHAT LAW GOVERNS THE CASE.

A. THE ARBITRATION AGREEMENT, BEING REMEDIAL, IS GOVERNED BY FEDERAL LAW.

The case being now in the Federal Courts, the laws of the United States control the proceedings, so far as remedial questions are concerned. (*Parry v. Bache* (1942), 125 F. 2d, 493, 495.) This includes the validity and construction of the arbitration provision, which goes to the remedy. (*Parry v. Bache, supra; Pioneer Trust & Savings Bank v. Screw Machine Products Co.* (1947) 73 F. Suppl. 578.)

B. IN APPLYING THE FEDERAL LAW CONCERNING THE REMEDY TO THE CIRCUMSTANCES HERE PRESENT, AMONG SUCH CIRCUMSTANCES TO BE CONSIDERED IS THE STATE OF THE SUBSTANTIVE RIGHTS OF THE PARTIES UNDER THE CONTRACT, WHICH SUBSTANTIVE RIGHTS ARE GOVERNED BY CALIFORNIA LAW.

In applying the Federal remedial law (the United States Arbitration Act, Title 9 U. S. C. A. Section 3) to the circumstances of this case, we shall find that we must determine whether there is here an "issue referable to arbitration under an agreement in writing for such arbitration", as the Arbitration Act puts it. We shall see that this question depends on whether the "agreement in writing" binds the parties to arbitrate this kind of controversy, or whether the provision in such agreement saving to the parties the right to "seek injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement" applies here. That problem of construction will involve some consideration of what are the substantive rights

of the parties under the contract as construed by the law governing such substantive rights. To that extent we must examine and apply the law of the state. (*Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 82 L. ed. 1188, 58 Sup. Ct. 817; *Ruhlin v. N. Y. Life Insurance Co.* (1937) 304 U. S. 202, 82 L. ed. 1290, 58 Sup. Ct. 860.) The state whose law is to be so applied in this case is California, not only because the contract so provides (Contract, paragraph 14, Transcript of Record, page 30); but also because it is the state in which the District Court sits (*Klaxon Company v. Stentor Electric Manufacturing Co., Inc.* (1941) 313 U. S. 487, 85 L. ed. 1477, 61 Sup. Ct. 1020; *Griffin v. McCoach* (1941) 313 U. S. 498, 85 L. ed. 1481, 61 Sup. Ct. 1023).

II. THE FEDERAL STATUTE HERE APPLICABLE CONTEMPLATES THAT FOR A STAY OF PROCEEDINGS TO BE ORDERED THERE MUST BE SHOWN AN "ISSUE REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION".

The pertinent portion of the United States Arbitration Act (Title 9 U. S. C. A., Section 3) applicable here, provides as follows:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had

in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration".

III. THE CONTROVERSY DISCLOSED IN THE COMPLAINT IN THIS ACTION IS NOT AN "ISSUE REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION".

A. ARBITRATION CONTRACTS (LIKE OTHER CONTRACTS) ARE TO BE CONSTRUED IN THE LIGHT OF THE INTENTION OF THE PARTIES, AND NO ONE IS BOUND TO ARBITRATE BEYOND THE POINT TO WHICH HE HAS EXPRESSED HIS WILLINGNESS TO DO SO.

While the New York law is not controlling here, we quote the language of Mr. Justice Cardozo, written when he was still on the New York Court of Appeals, in *Marchant v. Mead-Morrison Mfg. Co.* (1929) 252 N. Y. 284, 169 N. E. 386, 391, which we submit as at least persuasive authority, not only because of the substantial similarity of the New York and Federal arbitration statutes (see Appendix), but also because of the high authority of its writer.

> "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention. . . . There is nothing in the law, however, that exacts a submission so sweepingly inclusive. *The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to*

be to the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." (Italics supplied.)

B. TO ASCERTAIN THE INTENT OF THE PARTIES HERE WE MUST CONSIDER TWO APPARENTLY INCONSISTENT PROVISIONS.

1. **All disputes to be submitted to arbitration.**

The contract states in language which, if standing alone, could hardly seem plainer: ". . . in case any disagreement or difference shall arise at any time hereafter . . . in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration. . . ." (Contract, paragraph 10. Transcript of Record, page 29.) That is not all of it, however.

2. **But nothing shall preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach.**

Having used a clear and sweeping arbitration clause, the parties then added to it the clause which gives an entirely different meaning to the arbitration agreement: ". . . but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

First: All disagreements must be arbitrated; *but, then:* the parties retain their right to bring equitable

actions for injunctive relief to prevent "irreparable injury by reason of a claimed breach". If the original language is considered alone, there can be no situation in which resort to the courts can be had, for *any disagreement or difference, either as to construction or operation of the contract, or the respective rights and liabilities of the parties* is to be arbitrated. That covers everything. There simply is no justiciable controversy that is not embraced within the literal meaning of that broad language.

The parties, however, could not have meant that literally, because they added the above-quoted words which show unmistakably that they intended to preserve their rights of access to the courts in some instances at least.

C. APPARENTLY INCONSISTENT OR CONFLICTING PROVISIONS IN A CONTRACT MUST BE READ TOGETHER SO AS TO RECONCILE THEM IF REASONABLY POSSIBLE, GIVING EFFECT TO ALL.

It is one of the best established rules of contract law that apparently conflicting provisions of a contract should be reconciled, *if that can be done by any reasonable construction of the contract;* and that a provision must not be disregarded as inconsistent with other provisions *unless no other reasonable construction thereof is possible.*

See:

F. W. Woolworth Co. v. Peterson (1935) 78 F. 2d 47;

P. W. Brooks & Co. v. North Carolina Public Service Co. (1930) 37 F. 2d 220;

Norwich Union Indemnity Co. v. H. Kobacker & Sons Co. (1929) 31 F. 2d 411, 87 A. L. R. 1069;

Linde Dredging Co. v. Southwest L. E. Myers Co. (1933) 67 F. 2d 969;

Cities Service Gas Co. v. Kelly-Dempsey & Co. (1940) 111 F. 2d 247;

Carpenter v. Continental Casualty Co. (1938) 95 F. 2d 634;

Retsloff v. Smith (1926) 79 Cal. App. 443, 249 Pac. 886;

Wilson v. Coffey (1928) 92 Cal. App. 343, 268 Pac. 408; and

Coast Counties Real Estate and Investment Co. v. Monterey County Water Works (1929) 96 Cal. App. 269, 274 Pac. 415.

While it is true that if two inconsistent provisions in a contract are utterly and irreconcilably repugnant, then, as a general rule, the first will be given effect and the latter will be rejected. *(Du Puy v. U. S.* (1929) Court of Claims, 35 F. 2d 990; *Burns v. Peters* (1936) 5 Cal. 2d 619, 623; 55 Pac. 2d 1182), it has been said that this rule should be applied "only as a last resort". (See *Crescente v. Vernier* (1949) 53 N. M. 188, 204 Pac. 2d 785, 790.)

D. IN EXPLAINING AMBIGUITIES AND RECONCILING APPARENTLY CONLICTING PROVISIONS IN A CONTRACT, RESORT MAY BE HAD TO EVIDENCE OUTSIDE THE CONTRACT, TO EXPLAIN THE INTENTION OF THE PARTIES, INCLUDING EVIDENCE OF THE NEGOTIATIONS LEADING TO ITS EXECUTION.

When the meaning of a contract is not certain on its face because of conflicts between its various portions, then: "As an aid in discovering the all-important element of intent of the parties to the contract, the trial Court may look to the circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . . and the preliminary negotiations between the parties . . ." (*Universal Sales Corporation, Ltd. v. California Press Manufacturing Company* (1942) 20 Cal. 2d 751, 761, 128 Pac. 2d 665, 671.)

See also:

Balfour v. Fresno Canal & Irrigation Co. (1895) 109 Cal. 221, 226; 41 Pac. 876, 877;

Jegen v. Berger (1946) 77 C. A. 2d 1, 8; 174 Pac. 2d 489, 494;

Ryan v. Ohmer (1917) 244 Fed. 31, 34; 156 C. C. A. 459.

E. THE EVIDENCE PRODUCED BY APPELLEES CONCERNING THE NEGOTIATIONS LEADING UP TO THE EXECUTION OF THE CONTRACT GIVES AN EXPLANATION OF THE MEANING OF THE SAVING CLAUSE IN THE ARBITRATION PROVISION WHICH POINTS THE WAY TO INTERPRETATION AND RECONCILIATION OF THE APPARENTLY INCONSISTENT CLAUSES.

There is a conflict in the evidence concerning at which party's instance there was inserted in the arbitration provision the clause reading: ". . . but nothing

herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (See affidavit of Francis M. Neall, Transcript of Record, pages 44-48; and of Raymond T. Heilpern, Transcript of Record, pages 49-51.)

That becomes immaterial, however, because even if we assume for purposes of argument that Mr. Heilpern's recollection of the negotiations is the correct version, the rule construing a contractual provision against its draftsman is of no consequence here; because from the words of appellees' own witness, Mr. Heilpern, we have an explanation of the meaning of this saving clause. He stated in his affidavit (Transcript of Record, pages 50-51) as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. *He stated that if United States Plywood were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury.*" (Italics supplied.)

F. UPON APPLYING THE ABOVE PRINCIPLES, AND THE ABOVE EXPLANATION OF THE MEANING OF THE SAVING CLAUSE IN THE ARBITRATION PROVISION ASSERTED BY APPELLEES' OWN WITNESS, THE MEANING OF THE WHOLE ARBITRATION PROVISION TAKES SHAPE.

1. In any situation where the seller might wrongfully refuse or threaten to refuse to continue deliveries of logs, and buyer should claim that seller was or would be thereby breaching the contract, buyer was not content to rely on arbitration to give it adequate relief, but insisted on reserving its right to seek the aid of a court of equity.

This construction seems inescapable. If at any time the seller should "divert" the cedar logs from buyer's mill, buyer would not be satisfied with arbitration process, but because of the irreparable injury that would result from such "diversion" insisted on retaining the right to "injunctive relief" (which is equivalent to saying "suit in equity for the kind of relief which courts of equity give").

(a) In This Event, Actual Diversion (or Failure or Refusal to Deliver Logs) Would Not Be Necessary, But a Threat or Reasonable Fear of It Would Give Rise to the Right of Action.

Injunctive process is historically a remedy designed at least as much to prevent threatened injury as to stop injury in process. The words "injunctive relief" in the saving clause in question are not limited. There is nothing in the clause that indicates an intention to restrict the right of "injunctive relief" to cases where the injury has already occurred or is in process. Indeed, the words "to *prevent* irreparable injury" carry inevitably the thought of injunction against a *threatened* injury before it occurs. (See *Morris* v. *Iden* (1913) 23 Cal. App. 388, 138 Pac. 120, where the

Court enjoined a threatened breach of a lease by the lessor before it occurred; *Farnum v. Clarke* (1906) 148 Cal. 610, 84 Pac. 166, where threatened breach of a contract was enjoined.

(b) This Right to Injunctive Relief Against a Threatened Breach of a Contract Is Established If Irreparable Injury Would Result From the Breach, Even in Cases Where the Contract May Not Be Specifically Enforced; and Is Even More Clearly Recognized Where the Contract Is Specifically Enforcible.

As the Court said in *Morris v. Iden* (supra, 23 Cal. App. 388, 395-6) (after referring to the usual rule that breach of a contract which is not specifically enforcible will not be enjoined):

> "We believe, however, that the present case comes within the exception to the general rule which has been recognized in many cases. But a little over two months of the term of three years of the tenancy had elapsed when the defendants advertised for sale the personal property mentioned in the lease and thus threatened to do an act which, in view of the character of the business for which the property was to be used, would practically result in terminating the lease and so destroying the rights of the plaintiff thereunder. Obviously, the plaintiff was without a complete and adequate remedy in the ordinary course of law, for it would be impossible, under the circumstances, to estimate, except by mere conjecture, the damage he would suffer if the trespass threatened by the defendants was consummated. Upon this ground he is entitled to the protection of the injunctive jurisdiction of a court of equity, notwithstanding the want of that mutuality in

the contract necessary to authorize the specific enforcement of its terms. In *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699 (75 Pac. 329), and in other cases therein cited, the right to an injunction in a certain class of cases to prevent the violation of contracts which cannot be specifically enforced is distinctly recognized and put upon the ground of a want of an adequate remedy at law."

And in *Lane Mortgage Co. v. Crenshaw* (1928) 93 Cal. App. 411, 431; 269 Pac. 672, 681, in answering a contention that a contract, asserted to be one for personal services, was not specifically enforcible, and that therefore its breach would not be enjoined, said:

"While we do not hold that the contract in question is or could be specifically enforced, deeming that unnecessary to the decision, it is a settled rule of equity that the lack of this capability does not preclude a court from decreeing injunctive relief."

And in *Griffin v. Oklahoma Natural Gas Corporation* (1930) 37 F. 2d 545, 549, the Court of Appeals for the Tenth Circuit said:

"An injunction against the breach of a contract is a negative decree of specific performance. The power and duty of a court of equity to grant such injunction is broader than its power and duty to grant a decree of specific performance, since an injunction to restrain acts in violation of a lawful contract will be granted even when specific performance would be denied because of the nature of the contract."

And in *Roof v. Conway* (1943) 133 F. 2d 819, 826, the Court of Appeals for the Sixth Circuit said:

> "It is well understood that a United States court of equity will not entertain a suit for injunctive relief, unless it be shown that the suitor has no plain, adequate and complete remedy at law. In invariably applying this truism the Federal courts not only follow a long established principle of equity, but bow to the plain inhibition of the declaratory statute, Judicial Code, Sec. 267, U. S. C. A. Title 28, Sec. 384. *The converse is likewise true. Where there is no plain, adequate and complete remedy at law, a Federal court will award injunctive relief in appropriate setting.*" (Italics supplied.)

And where the contract, breach of which is threatened, is specifically enforcible, it is clear that its breach is enjoinable. (See *Farnum v. Clarke* (1906) 148 Cal. 610, 620-21; 84 Pac. 166.)

2. **The other portion of the arbitration clause, providing generally for arbitration of disputes, must, on the other hand, be restricted in its application to those areas of disagreement as to facts where actual breach or repudiation of the contract is not the issue involved.**

In view of the above mentioned statement by appellees' witness, Mr. Heilpern, as to the purpose of the clause saving the right to injunctive relief (Transcript of Record, pages 50-51), and of the principles of construction above referred to, which require reconciliation of apparently inconsistent provisions if possible: we must consider the meaning, scope and extent, not only of the saving clause (as we have done

next hereinabove) but also of the general arbitration provision. We are bound by the same principle of construction to reconcile this general arbitration clause with the particular saving clause, if possible. We cannot disregard it, any more than we would concede that appellees may disregard the saving clause retaining the right to "injunctive relief". It is there. The parties left it in the agreement in spite of their intention that "diversion" of logs, causing irreparable injury, would be *enjoinable* and *not arbitrable*. It means something.

Logic compels us to the conclusion that this general arbitration clause applies to all other situations not covered by the saving clause. It applies, that is, to all situations of disagreements other than those involving the issue of a threatened or actual repudiation of the contract.

(a) That Is to Say, in Effect, That Wherever Disputes as to Pure Matters of Fact Are Concerned, the Rights of the Parties in the Light of Those Facts Being Undisputed, Arbitration Is the Method by Which Those Facts Are to Be Determined.

Let us suppose that the parties were in complete agreement as to the main issue on the merits in this controversy, that is, as to whether common cost of the logs of all species were to be determined *before* or *after* deduction for visible defects (*gross* or *net* scale). Let us suppose that instead of that being the issue, (as it is), the parties were in complete agreement that net scale was to be used and that such was the true meaning of the contract. Let us then suppose that a dispute arose, not as to the *meaning* or *legal inter-*

pretation of the contract, but as to a pure question of *fact,* namely: how many thousand feet of logs (so measured on net scale) had been delivered. Such a dispute would seem to be in the area left to arbitration.

(b) On the Other Hand, Legal Questions, or Mixed Questions of Law and Fact, Directly Affecting the Liability of the Parties to Proceed With the Contract, Are Not Arbitrable, But Remain Justiciable.

But where any legal question, or a mixed question of law and fact (such as one involving interpretation of the meaning of the contract) arose, the determination of which directly affected and governed the right of one party or the other to repudiate or go on with the performance of the contract; then the controversy would be beyond the scope of the so-called "arbitration", and was reserved to litigation in the Courts, *at least in those cases not involving mere suits at law for damages or money payments, but rather, equitable actions to prevent complete forfeiture of rights or irreparably injurious breach.*

(c) In Short, by Reason of the Addition of the Saving Clause Reserving the Right to Injunctive Relief, the "Arbitration" Referred to in the General Clause Is No Longer Unlimited Arbitration of All Disputes of Every Kind, But Is Limited to Fact Finding in Issues Not Directly Threatening Forfeiture of the Contract; That Is, the "Arbitrators" Are in the Nature of "Appraisers", or "Measurers".

We submit that while the word "arbitration" is used in the contract, its meaning is reduced, by the addition of the saving clause, to "appraisal" or "fact finding".

The case of *Rives-Strong Building, Inc. v. Bank of America N. T. & S. A.* (1942) 50 C. A. 2d 810, 123 Pac. 2d 942, is of interest in this connection. There, a lease contained a provision for renewal of the term at a rental (if not agreed on by the parties) to be fixed by "arbitration". The parties being unable to agree on the renewal rent, a so-called "arbitration" was had, and upon the award being made, one party brought action to nullify the award on the ground that certain procedural requirements of the statutes relating to arbitration had not been followed. The trial Court nullified the award on such ground. On appeal the District Court of Appeal reversed, and upheld the award, on the basis that it was not true "arbitration" but rather "appraisal", and was not governed by the statutory rules relating to true arbitration.

After reviewing the authorities establishing the clear distinction between true "arbitration" and "appraisal", the Court said (50 C. A. 2d 817):

> "Turning to the lease itself to determine what the parties intended, we find a very simple wording, with no conditions or restrictions placed upon the persons named, no method of procedure suggested and no hearings or notices mentioned. In fact, the provision is so aptly worded for the purpose of requiring a mere appraisal or valuation that if the word 'appraiser' is substituted for the word 'arbitrator' in the lease no serious contention could be made that the parties intended it to be a statutory arbitration agreement. The use of the word 'arbitrator' is of course not controlling".

And this Court itself has declared this same distinction between "arbitration" and "appraisal".

In *Luedinghaus Lumber Co. v. Luedinghaus* (1924) 299 Fed. 111, the parties made a timber contract which provided among other things that if there should be less than 100 million feet of timber on the land, the seller should be required to buy and make available additional land to the buyer to make up the shortage. The amount of timber was to be determined by cruisers employed by the respective parties, who should in turn select a third.

Litigation and cross litigation was commenced, claiming breach of the contract on both sides. One of the issues was whether a cruise made, purportedly pursuant to the contract, was conclusive on the parties.

It appears that at that time, before the United States Arbitration Act, executory agreements for arbitration were considered abrogable; and the District Court ruled that the provision for the cruise was a provision for "arbitration", and as such, was subject to abrogation by the parties. This Court, while it concluded that the cruise and appraisement had not been made in accordance with the contract, and was therefore not conclusive, nevertheless pointed out that the provision in question was not one for "arbitration" but for "appraisal" or "measurement". Hence, it was not abrogable as an agreement for "arbitration", but enforcible as one for a method of appraisal.

This Court said (299 F. 113):

> "We are unable to agree with the court below that the provision in the contract for the deter-

> mination of the amount of timber on the lands was an agreement to arbitrate a dispute should one arise between the parties, or that the agreement and the question of its revocability are determinable by the rule of the common law as to arbitration and award. Arbitration presupposes a dispute and is a recognized common-law method of settling disputes and controversies. If there is no matter in dispute there is no question for arbitration. . . . *There is a broad distinction between a submission to arbitration and a provision for incidental appraisement or measurement*". (Italics supplied.)

While the arbitration provision in the present case is not so clearly limited to "appraisal" or "measurement" as it was in these two cases next above cited, we submit that to limit it to this meaning reconciles the two apparently inconsistent provisions, gives effect to both, gives meaning to all of paragraph 10 (Transcript of Record, page 29), and is reasonable.

G. APPLYING THE INTERPRETATION OF THE "ARBITRATION" PROVISION THUS DEVELOPED TO THE FACTS SHOWN BY THE RECORD HERE, THIS ACTION FALLS WITHIN THE CATEGORY OF THE SAVING CLAUSE RESERVING THE RIGHT TO INJUNCTIVE RELIEF, RATHER THAN THE CATEGORY OF ARBITRABLE DISPUTES; AND THE ISSUES HEREIN ARE THEREFORE NOT "REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION", SO AS TO JUSTIFY A STAY.

The phrase "irreparable injury by reason of a claimed breach of this agreement" (Transcript of Record, page 29) requires analysis. This wording fits either of two cases: (1) where the *plaintiff* claims that

the *defendant* is about to breach the contract and seeks to enjoin the defendant from doing so on the ground that the threatened breach will result in irreparable injury to the plaintiff; and (2) where the *plaintiff* fears that the *defendant* is about to take steps, such as rescission or cancellation, based on *defendant's* claim that *plaintiff* has breached the contract. The wording of the saving clause applies with equal force and logic to either situation.

Here the complaint shows that the parties are in dispute over the method of computing the price of the logs, which is based on their *"actual cost"*. (Transcript of Record, pages 12-14.) Appellants (purchasers) face the danger of forfeiture through rescission or cancellation by appellees (sellers) on the basis of appellees' claim that appellants have breached the contract. (Complaint, paragraphs XIII and XIV, Transcript of Record, pages 15-16.) Appellees have asserted through their counsel the right to "insist" on prompt payment of the balances due computed according to their theory, even pending arbitration. (Letter from Mr. Heilpern, set forth in affidavit of Francis M. Neall, Transcript of Record, pages 47-48.)

In the face of that declared position, arbitration will not save appellants from legal reprisals by appellees while it is going on. The dilemma faced by appellants requires them to choose between paying appellees' demands or facing the clear and threatened danger of purported cancellation or rescission by appellees based on their claim that appellants have

breached the contract. Such a refusal to deliver logs would be a "diversion" of them as contemplated in the negotiations leading up to the insertion of the saving clause. (Transcript of Record, pages 50-51.)

The letter from Mr. Heilpern (Transcript of Record, pages 47-48) was not idly written. A prudent man acting with due diligence and concern for the affairs of his business, on receiving such a letter must infer from it unmistakably a threat that the defendants will seek any legal remedy available, as on a breach, unless, *despite a pending arbitration*, appellants abide by appellees' construction of the contract.

In the face of that declared position, arbitration will not save appellants from legal reprisals by appellees while it is going on.

We submit that such a situation is the very kind of case to which the saving clause reserving the right to seek injunctive relief was intended to apply.

If appellees, under an erroneous interpretation of the disputed provisions of the contract concerning the method of determining actual logging cost, attempt to declare appellants' rights forfeit, or purport to cancel or rescind (that is to say, if they "divert" the logs elsewhere and refuse to deliver them under the contract); then any act of appellees denying appellants' right to deliveries under appellees' interpretation of the contract will be a breach thereof by appellees. In the final analysis, then, what appellants seek is to prevent appellees from committing a threatened breach of the contract.

As we have shown above threatened breach of a contract may be enjoined, even in some instances where specific performance would not be decreed, if irreparable injury be shown; and clearly where specific performance would be decreed. Even though the contract in question concerns personal property it may be specifically enforced if inadequacy of the legal remedy be shown. (See *Korabek v. Weaver Aircraft Corporation* (1944) 65 C. A. 2d 32, 149 Pac. 2d 876.)

The complaint shows that if appellants are deprived of the deliveries under the contract they will lose not only their substantial investment in a sawmill in the vicinity, but also an assured supply of cedar timber for upwards of twelve years, and will face the incidental harassment and undeterminable expense of various actions and proceedings, including arbitration. How can the legal damages resulting from the loss of a supply of cedar timber suitable to pencil manufacture be ascertained? Such a question is in the field of conjecture and guesswork. No damages that may be awarded could be said with any confidence to be adequate or to bear any relation to events as they may turn out over the next twelve years or more.

H. THIS ACTION FOR AN INJUNCTION AGAINST BREACH BY UNWARRANTED REPUDIATION OF THE CONTRACT BEING JUSTICIABLE AND NOT ARBITRABLE ALL PROPER INCIDENTAL REMEDIES CAN BE ASKED, INCLUDING THE REMEDY OF DECLARATORY RELIEF INCIDENTAL TO ACTIONS IN EQUITY, AND ALSO INJUNCTION AGAINST THE UNWARRANTED ARBITRATION ITSELF.

At the hearing before the District Court counsel for appellees made much of the contention that this is an

action to enjoin arbitration proceedings, and that we are begging the question, or lifting ourselves by our own boot straps, by seeking to enjoin arbitration and *thereby* establish this as an action for injunctive relief.

That, however, is not our purpose or our claim. We assert, primarily, the right to have appellees enjoined from wrongfully breaching the contract by refusing deliveries under it, in reliance on their claim of right to forfeit, or cancel or rescind because of their incorrect contention that we have breached it.

If, as we believe, we have hereinabove established appellants' right to such an injunction, then a court of equity may take complete control of the case. If it deems it proper to enjoin such threatened breach by appellees, it may go further and exercise its equitable jurisdiction fully, giving all proper incidental remedies warranted by the exigencies of the case. This includes the giving of declaratory relief. Furthermore, if we have succeeded in establishing that this primary issue of injunction against breach of the contract is a matter for judicial determination, rather than arbitration, and that such issue is not "referable to arbitration", then any attempt by appellees to force appellants to arbitrate such an issue when they are not required to, is itself a cause of irreparable injury if it succeeds. It would subject appellants to expense and trouble unjustifiably by making it necessary for them to defend their contentions before arbitrators. It would thereby subject them to multiplicity of suits. And it would appear to be a truism that if one is

wrongfully deprived of his day in Court and of his right to appeal to the Courts to seek redress of wrongs, he is irreparably injured.

We are not seeking to beg the question by seeking "injunctive relief" against arbitration and *thereby* bring the case within the non-arbitrable category. We are rather establishing it as a case justifying injunction against breach of the contract ("injunctive relief to prevent irreparable injury"), in which event it is established as a non-arbitrable controversy; whereupon as an incident to the main relief sought, we ask also for relief from the harassment of unwarranted and unrequired arbitration.

IV. EVEN IF THE CONTROVERSY DISCLOSED IN THE COMPLAINT HAD ORIGINALLY BEEN AN "ISSUE REFERABLE TO ARBITRATION", IT IS SO NO LONGER, BECAUSE APPELLEES' CONDUCT, BEING INCONSISTENT WITH IT, HAS WAIVED WHATEVER RIGHT THEY ORIGINALLY MAY HAVE HAD TO COMPEL ARBITRATION.

As above stated, the United States Arbitration Act (Title 9 U. S. C. A., Sect. 3) requires that on an application for a stay it must be shown that the applicant for the stay is not in default in proceeding with arbitration.

A Federal Court is vested with discretionary power, under the Act, to deny arbitration on the ground that the party requesting it is himself in default in proceeding with it. (*La Nacional Platanera S. C. L. v. North American Fruit & Steamship Corporation* (1936) C. C. A. 5th, 84 F. 2d 881.)

Conduct of a party so inconsistent with arbitration as to evidence a waiver of it, would be a "default in proceeding with such arbitration".

One who by his conduct prevents or seeks to prevent the parties from remaining *in statu quo* pending arbitration, is not entitled to plead an arbitration clause as a bar to an action in the Courts. See *Winsor v. German Savings & Loan Soc.* (1903) (Washington) 72 Pac. 66. In that case the lessee of hotel property sued to enjoin interference with his use of an archway between the leased property and adjoining property by the occupant of the adjoining property, under a party wall agreement executed between former owners of the adjoining buildings. The party wall agreement contained a provision binding the parties to arbitrate future disputes. The defendant raised by demurrer the defense that plaintiff could not maintain the action without first arbitrating. The Court rejected this defense on the ground that the defendant, having barred the archway and deprived plaintiff of the use of the hallway, elevator and stairway, had waived the arbitration clause. The Court said, at page 67:

> ". . . they at least by these acts have waived the arbitration clause in the agreement, and can not now be heard to say that 'we are in possession wrongfully, but, before you have any rights which may be enforced, you must propose an arbitration, and then, if we refuse, you may resort to the courts for redress.' *An agreement for arbitration necessarily implies that the property over which the dispute arises must remain in statu quo pending the arbitration . . .*" (Italics supplied.)

When a party has taken action inconsistent with an arbitration, he will be deemed to have waived his right to arbitration. See *Young v. Crescent Development Co.* (1925) 240 N. Y. 244, 148 N. E. 510. There, arbitration of a damage suit by a contractor against an owner was denied upon two grounds, the first (immaterial here) being that an action for damages based on breach was not arbitrable, since that particular clause was intended to cover other situations; the second ground being that by filing a mechanic's lien claim, and thereby taking action inconsistent with an arbitration, the contractor had waived it. The rule of this *Young* case, insofar as it concerned mechanics' liens specifically, was changed by statute in New York in 1929, by addition of Sect. 35 to the New York Lien Law (McKinney's Consolidated Laws of New York, Book 32, Liens, Sect. 35), providing in part: "The filing of a notice of lien shall not be a waiver of any right of arbitration . . .". The principle for which the case is cited here, however, is not impaired by the statutory change—only its application to a particular situation.

In this case, the appellees, by the letter from their counsel above referred to (Transcript of Record, pages 47-48), have insisted that, pending arbitration, the payments by appellants be made according to appellees' interpretation of the contract. The letter contains a thinly veiled threat to avail themselves of other legal remedies if such payments are not kept up. This is certainly not leaving the parties *in statu quo*. This is conduct inconsistent with a disposition to arbitrate. The

appellees are just as much bound by the arbitration clause as are the appellants. If appellants were to default (which they contend they have not and do not intend to), appellees on their part could not bring any action or exercise any other legal remedies without being in the teeth of the arbitration clause, unless exempted therefrom by the saving clause reserving the right to "injunctive relief" upon which appellants rely herein. Appellees' tacit threat contained in their counsel's letter, while it is an attempt to protect their interests, is analogous to the act of the contractor in the *Young* case (supra) in filing a mechanic's lien to protect his claim pending arbitration. It is like the act of the defendant in the *Winsor* case (supra), in closing up the disputed archway while calling for arbitration of the question whether he had the right to do so. Appellees can not blow hot and cold. They either stand on their claimed right to arbitration, or they abandon it. If they arbitrate they must preserve the *status quo.* This, it appears from their counsel's letter, they are not willing to do. Having evidenced this intent, they must now be taken to have waived arbitration. If they have so waived it, they can not change their minds and demand it as a condition precedent to these Court proceedings. That point was declared by the New York Court of Appeals in the *Young* case (supra).

Since we have relied herein on some New York cases; and since the California law and decisions are necessarily involved here, as well as the United States Arbitration Act, we are setting forth in an Appendix

hereto, the pertinent portions of the Federal, California and New York statutes relating to arbitration, to show their substantial similarity.

For the reasons herein stated we respectfully submit that the portion of the Order of the District Court appealed from granting a stay pending arbitration, should be reversed, and the motion of appellees for a stay be ordered denied.

Dated, Oakland, California,
February 15, 1950.

Respectfully submitted,
BRUNER & GILMORE,
McKEE, TASHEIRA & WAHRHAFTIG,
RIDLEY STONE,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

UNITED STATES ARBITRATION ACT, U.S.C.A., TITLE 9, SECTION 3.

Pertinent Portions:

Stay of proceedings where issue therein referable to Arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CALIFORNIA CODE OF CIVIL PROCEDURE.

Pertinent Portions:

Section 1280.

Validity of arbitration agreements. A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 1281 of this code, shall be valid, enforceable and irrevocable, save

upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, the provisions of this title shall not apply to contracts, pertaining to labor.

Section 1284.

Stay of civil action. If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration.

NEW YORK CIVIL PRACTICE ACT, ARTICLE 84.

Pertinent Portions:

(The former Arbitration Law, constituting Chapter 72, Consolidated Laws, appears to have been superseded, in 1937, by a substantially similar enactment constituting Article 84 of the Civil Practice Act. See Clevenger's Practice Manual, 1949.)

Section 1448.

Validity of arbitration contracts or submissions. Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or

more arbitrators any controversy existing between them at the time of the submission which may be the subject of an action, *or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties.

A controversy *cannot be arbitrated,* either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness

unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission *or contract* has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The second subdivision of this section does not prevent the *arbitration* of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

Section 1449.

Form of contract or submission. A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

Section 1451.

Stay of proceedings brought in violation of an arbitration contract or submission. If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme court or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

(Italics in New York Statute included as shown in Clevenger's Practice Manual 1949. Presumably indicate new matter added by the recodification.)

No. 12,429

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For the Ninth Circuit

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vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF OF APPELLEES

JURISDICTION

Appellees concur that the District Court had jurisdiction and that this Court has jurisdiction to review the order in question.

STATEMENT OF THE CASE

The appellee, United States Plywood Corporation, entered into a contract to sell logs to the appellant, Hudson Lumber Company (R. 19-36 incl.). Paragraph Three of the contract (R. 21-25) sets out a formula for determining the cost of the logs sold under the contract. As set forth in Paragraph XI of appellants' complaint (R. 14) a controversy has arisen between the parties "as to the meaning and effect and applica-

tion" of these provisions. Some time subsequent to July 21, 1949, and prior to August 4, 1949, Mr. Heilpern, counsel for United States Plywood Corporation, wrote a letter to counsel for the appellants, replying obviously to a letter which had questioned a statement as to the costs of the logs delivered. In this letter Mr. Heilpern stated that in his opinion the statements of the auditor had been prepared in conformity with the contract and insisted on payment of the amounts based on their statements. His letter closes with this language:

> "If the parties to the agreement are unable to settle amicably their differences, such dispute can, of course, be arbitrated as provided in paragraph '10' of the contract. However, pending such arbitration, it is expected that your client will pay all invoices at the time and in the manner specified in the contract." (R. 47, 48)

Shortly thereafter the appellants instituted an action in the Superior Court of the State of California for the County of Alameda, setting up the fact that such controversy had arisen, asking for declaratory judgment as to "the true meaning, effect and application" of the contract provision relating to cost, and "that defendants and each of them be enjoined from: (1) commencing other actions or proceedings pending determination of this action, to enforce or recover their claimed rights under the matter in controversy; (2) proceeding or attempting to proceed to arbitration or to compel plaintiffs to submit thereto; (3) cancelling or attempting to cancel or declare forfeit the rights and interests of the plaintiffs under said contract by reason of any claimed default resting in

defendants' contentions as to the matter in controversy above set forth" (R. 18).

The appellees removed the case to the United States District Court, Northern Division, moved for dismissal of the action and in the alternative for a stay, under the provisions of 9 U.S.C.A. §3, and the court granted the stay.

QUESTIONS INVOLVED

In our view of this case it is so simple that it is difficult to formulate a statement of the questions involved which will present the issue which the appellants apparently are attempting to assert. Two questions are presented:

1. When a contract provides that in case of any disagreement or difference as to the construction thereof such disagreement shall be submitted to arbitration, and a disagreement has arisen as to the construction of such contract and one party thereafter brings an action for declaratory judgment and requesting among other relief that the other party be enjoined from proceeding with arbitration, is the other party entitled to a stay of action in accordance with the provisions of 9 U.S.C.A., §3?

2. When such arbitration clause contains this statement, "but nothing herein shall be deemed to preclude either party from securing injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement," does a request by one party for arbitration constitute irreparable injury within the meaning of this clause?

ARGUMENT

I. Summary of Argument

When the parties have entered into a contract which contains a provision for arbitration of all controversies arising thereunder and a dispute arises between them as to the interpretation of a clause specifying the method of determining the cost of the subject matter of the contract and one party brings an action for declaratory judgment and to enjoin the other from commencing any other action to enforce their claimed rights under the contract and from proceeding or attempting to proceed to arbitration and from compelling or attempting to compel the rights of the plaintiff under the contract, the defendants (appellees here) are entitled to a stay of further proceedings pending further arbitration under the express provisions of 9 U.S.C.A., §3.

Where the arbitration clause contains this language:

> "* * * but nothing herein shall be deemed to preclude either party from securing injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement,"

and the matter in controversy is the method of determining the cost of the product to be sold under the contract, a request by one party (appellees) for arbitration of the controversy or an indication that they will attempt to secure arbitration of the controversy, all in accordance with the express terms of the arbitration agreement, cannot constitute irreparable damage within the language of the arbitration clause above quoted.

II. The Arbitration Clause in the Contract, Separate from the Exception Clause Would Clearly Entitle Appellees to a Stay of the Action Brought by Appellants.

The arbitration clause in question is as follows:

> "10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (R. 29)

It is obvious that if this clause ended with the words "pursuant to the rules of the American Arbitration Association as then in effect" there could be no question whatsoever as to the propriety of the order of the court staying this proceeding pending arbitration. 9 U.S.C.A., §3, reads as follows:

> "§3. Stay of proceedings where issue therein referable to arbitration.
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been

had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, §1, 61 Stat. 669."

This section is applicable to actions removed from a state court to a federal court. *Perry v. Bache*, 5 Cir., 125 F.2d 493. The application of the statute is not limited to contracts mentioned in 9 U.S.C.A. §2. *Donahue v. Susquehanna Collieries Co.*, 3 Cir., 138 F.2d 3.

Appellees are entitled to a stay of all proceedings pending arbitration. *Evans v. Hudson Coal Co.*, 3 Cir., 165 F.2d 970. *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583; *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 2 Cir., 126 F.2d 978.

With the exception of two arguments of the appellants which we will dispose of later, their entire brief is devoted to an effort to bring themselves within the closing language of the arbitration clause again quoted for easy reference and which reads as follows:

"10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (R. 29)

III. The Language in the Arbitration Clause Reserving the Right of Injunctive Relief Does Not Apply to a Controversy Between the Parties as to the Interpretation of a Clause of the Contract.

It is not necessary in this proceeding to determine the entire scope of the language in question. Its only importance is whether it takes this particular case out of a situation where otherwise the appellees (defendants below) would clearly be entitled to a stay. In considering this it must be borne in mind that all we have is a controversy as to the interpretation of a clause in a contract, a declaration by the attorney for the appellees that he feels his client's interpretation is correct, and an offer to arbitrate in accordance with the contract. From such a molehill, the appellants have constructed themselves a mountain compounded of "ifs" and "maybes," for it must be noted that these things that they say may happen are based upon speculations and fears. For instance, in the statement in the summary of points in appellant's brief at page 13, this statement is made (emphasis is supplied):

> "10. *If* appellees rescind or cancel the contract or declare forfeit appellants' rights thereunder (that is to say, *if* appellees refuse further deliveries of cedar logs under the contract) by reason of appellants' failure to pay the larger amounts claimed by appellees etc."

Again, at page 7 of their brief they say:

> "* * * appellants *fear* that appellees will purport to cancel or refuse performance, etc.",

and the same word "fear" appears at page 32 of their brief:

> "* * * and (2) where the plaintiff *fears* that

the defendant is about to take steps such as rescission or cancellation, etc."

It requires no extended citation of authority that an injunction will not be granted merely on the basis of fears and apprehensions. *City of Osceola, Iowa v. Utilities Holding Corporation*, 8 Cir., 55 F.2d 155:

> "The applicable rule is thus stated in 32 Corpus Juris at page 42: 'It is not sufficient ground for an injunction that an injurious act may possibly be committed, or that injury may possibly result from the act sought to be prevented; but there must be at least a reasonable probability that an injury will be done if no injunction is granted, and not a mere fear or apprehension. Injunctions will not be granted merely to allay the fears and apprehensions of individuals, which, it has been said, may exist without substantial reasons and be absolutely groundless. In these circumstances the mere fact that an injunction would not injure the defendant will not authorize its issuance." (p. 158)

The fact is that appellants having once agreed to arbitrate have now changed their minds. These parties made a contract which provided for arbitration of disputes concerning its construction. Such a dispute has arisen. The appellees are ready to arbitrate in accordance with the express provisions of the contract and the appellants do not wish to. They say, in their complaint:

> "Defendants threaten to attempt to compel such arbitration proceedings, notwithstanding the said provisions of said contract saving to the parties the right to seek injunctive relief. If

> plaintiffs are compelled to proceed to such arbitration they will be denied their day in court and the expressly reserved right to injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract, *and will thereby be irreparably injured by being forced to accept the award of arbitrators rather than the decree of a court of equity after a hearing and determination according to law.*" (R. 17) (Emphasis supplied)

It is thus apparent that the appellants want this issue tried in a court of law instead of by arbitration and are trying to avoid the agreement which they made that such matters should be arbitrated. If they preferred to settle these disputes by litigation instead of by arbitration, the time to have raised that objection was before the contract was signed calling for arbitration, and not after the contract was executed with an arbitration clause and a dispute has arisen within the precise scope of the arbitration clause.

In Paragraph XV of appellants' complaint (R. 16, 17) this clause is apparently considered as giving the parties the alternative of seeking arbitration or injunctive relief.

It will be noticed that injunctive relief may be sought to prevent irreparable injury by reason of a claimed breach of the contract. Appellants do not claim that appellees have breached the agreement, nor do they say that either party claims that the other has breached the agreement.

Appellants say that a disagreement exists as to the *interpretation* of the contract and they go further and

say that the appellees threaten to compel arbitration on such disagreement.

We fail to see how the action of the appellees in seeking to arbitrate a disagreement of the type covered and intended to be covered by the arbitration agreement, can constitute a breach of that contract.

We have stated earlier that it is not necessary in this case to determine the exact scope of the closing clause of the arbitration agreement, but merely to see that it does not apply in this instance. The appellants have made reference in their brief to two affidavits (R. 44-48), one by the president of one of the appellants and one by counsel for appellee, United States Plywood Corporation (R. 49-51) which are in disagreement as to which party requested the language in the arbitration clause. While we refer to what Mr. Heilpern said in his affidavit, it is not necessary, as we have indicated above, to rest our argument on the example given as to the meaning of this clause which is as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such in-

> jury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury." (R. 51)

The intent of the injunctive relief provision in the arbitration clause clearly appears to be that if one of the parties seeks to rescind, or refuses further to perform the contract on account of a claimed breach, the other party is not barred, if it can bring itself within the equitable rules relating to injunctions, from seeking to prevent such rescission or non-performance, pending the determination of the controversy in arbitration proceedings. In this connection it will be noted that the first sentence is a firm commitment that any disagreement or difference "shall be submitted to arbitration in the State of California. * * *." It can hardly be seriously argued that plaintiffs make out a case of irreparable damage, within equity rules, through being compelled to arbitrate as they agreed to do, in case of "any disagreement or difference."

IV. The Contract Provision in Question Is Clearly for Arbitration and Not Appraisal.

There appears to be a thread of argument running through the brief of appellants beginning on page 26 and pointed up at page 28 to page 31 that the arbitration clause really was a clause for appraisal and not for arbitration.

In considering this argument of the appellants we wish to call the attention of the court to the language of the arbitration clause, being Paragraph 10 of the

contract (R. 29), which provides for arbitration in case of "any disagreement or difference * * * either as to the construction or operation thereof or the respective rights and liabilities thereunder." Despite this all inclusive language, appellants conclude (pp. 27, 28 of their brief) that the arbitration clause was intended to cover only pure matters of fact and not to include "any legal question or mixed question of law and fact." Such a conclusion, of course, is squarely contrary to the express language used in the instrument.

It is not our intention to burden the court with an extended discussion of the distinction between appraisal and arbitration which is, of course, well known. Appraisals relate to determination of quantities, values and the like.

The case of *Luedinghaus Lumber Co. v. Luedinghaus*, 9 Cir., 299 Fed. 111, cited by appellants (page 30 of their brief) involved a question as to the *quantity* of timber—a problem of measurement. Of course, the court held that this involved an appraisal, not an arbitration. The very quotation from the opinion (pp. 30-31, appellant's brief) points out the proper distinction. We quote in part:

> "'* * * Arbitration presupposes a dispute and is a recognized common-law method of settling disputes and controversies. If there is no matter in dispute there is no question for arbitration. * * * *There is a broad distinction between a submission to arbitration and a provision for incidental appraisement or measurement*'." (Italics supplied)

In the course of this same opinion the court quotes from the leading case of *Palmer v. Clark*, 106 Mass. 373:

> " 'A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisment of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable'." 299 Fed. 111, 113.

The California case cited by the appellants (p. 29 of their brief) *Rives-Strong Building, Inc. v. Bank of America, N.T. & S.A.*, 50 C.A.2d 810, 123 P.2d 942, involving as it did the determination of rental on the renewal of a lease, clearly involved appraisal and not arbitration.

> "There is a clearly recognized distinction between the arbitration of a controversy and a contract one term of which calls for the ascertainment by designated persons of values, quantities, losses or similar facts. Palmer v. Clark, 106 Mass. 373, 389." *Franks v. Franks*, 294 Mass. 262, 1 N.E.2d, 14, 16.

> "It is the general rule that provisions in contracts for price or value fixing are held to provide for appraisals and not arbitrations." *Hegeberg v. New England Fish Co.*, 7 Wn.2d 509, 519, 110 P.2d 182, 186.

The arbitration clause in this case covers "any disagreement or difference—in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder * * *." This obviously refers to an arbitration—not

an appraisal. And appellants own complaint shows that the issue in controversy is obviously one for arbitration and not appraisal.

"XI.

"An actual controversy has arisen and now exists, between the plaintiffs on one side and the defendants on the other, as to the meaning and effect and application of the above quoted provisions of said contract relating to the measuring and scaling of the logs and the method of computing and determining the cost of said cedar logs.

"Plaintiffs contend that the 'common cost' therein referred to, of all species derived from the La Tour timber should, under the true meaning of said provision, be computed on the net scale of all the logs of all species, after deduction and allowance for all visible defects as set forth in said cutting contract.

"Defendants contend that such 'common cost,' under the true meaning of said provision, should be computed on the gross scale of all logs of all species, before deduction and allowance for said defects." (R. 14)

However, even the type of present controversy is not controlling:

"* * * a clause of general arbitration does not cease to be within the statute when the dispute narrows down to damages alone (citing cases). If the clause is general in form, it make no difference what may come up under it." *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 70 F.2d 297, affirmed 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583.

V. Appellees Have Not Waived Their Right to Arbitrate This Controversy.

At pages 36-40 of their brief appellants argue that the appellees have waived their right to request arbitration. It is quite true that the court may refuse to stay a proceeding pending arbitration on the application of a party who is in default. The question as to the meaning of the words "default in proceeding with such arbitration" contained in the statute has been discussed by the courts and will be referred to later. We wish to point out to the court the facts in the case of *La Nacional Platanera S. C. L. v. North American Fruit & Steamship Corporation*, 5 Cir. 84 F.2d 881, cited by appellants at page 36 or their brief.

> Plaintiff began an action in state court in 1931. The complaint was filed in March, 1932.
>
> April, 1932, the suit was removed to the Federal Court.
>
> June, 1932, demurrers were filed.
>
> September, 1932, plaintiff moved to remand the cause to the state court.
>
> It was argued May, 1935, and denied June 5, 1935.
>
> November, 1935, plaintiff for the first time asked that the dispute be submitted to arbitration.

The court says at page 883:

> "* * * We have no hesitancy in deciding that by bringing the action at law to recover damages, ignoring the provisions of the charter party for arbitration, and then delaying for nearly four

> years before attempting to invoke arbitration, plaintiff was so much in default that he was not entitled to demand arbitration."

It is obvious that this case is entirely inapplicable to the case at bar.

The cases of *Winsor v. German Savings & Loan Soc.*, 31 Wash. 365, 72 Pac. 66, and *Young v. Crescent Development Co.*, 240 N.Y. 244, 148 N.E. 510, cited at pages 37 and 38, appellants' brief, are simply not in point. The appellees have done nothing to disturb the *status quo* in this case. They are ready to arbitrate at any time, and their desire to so arbitrate obviously prompted this action brought by the appellants.

The question of waiver is considered at length in the case of *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 2 Cir., 126 F.2d 978. There is a very excellent discussion on page 989 from which we quote in part as follows:

> "There remains to be considered the language of Section 3 of the Act that 'on application,' such a stay shall be granted 'providing the applicant for the stay is not in default in proceeding with such arbitration.' We take that proviso to refer to a party who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced. The appellant was never asked by appellee to proceed with the arbitration; indeed, it is the appellee who has objected to it. In Shanferoke Coal & Supply Corp. v. Westchester S. Corp., 2 Cir., 1934, 70 F.2d 297, plaintiff alleged that defendant, after part performance, materially breached the contract. The defendant in its

answer denied the allegations and, as a special defense, set up an arbitration clause in the contract, alleged that it was willing to arbitrate, and moved for a stay under Section 3 of the Arbitration Act. Answering plaintiff's contention that defendant was 'in default in proceeding with such arbitration,' we held that the fact that defendant may have breached the contract was not a 'default' within that statutory provision; we said that the initiative as to proceeding with the arbitration rested upon plaintiff, adding: 'If it did not but sued instead, it was itself the party who fell "in default in proceeding with such arbitration," not the defendant.' Our decision was affirmed in Shanferoke Co. v. Westchester Co., 1935, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583.

"Accordingly, we conclude that the defendant here was not in default within the meaning of the proviso in Section 3. It follows that the district court should have stayed the suit pending arbitration to determine the damages."

See also *Almacenes Fernandez, S.A. v. Golodetz*, 2 Cir., 148 F.2d 625, and *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583,

CONCLUSION

The remainder of appellants' brief is devoted to the exposition of legal principles which may very well be correct statements of law but which are wholly irrelevant to the issues here on appeal. This case is clearly one for arbitration, which received congressional approval in enacting the Arbitration Act. See *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 453, 55 S. Ct. 313, 79 L. ed. 583. We submit that the action of

the District Court in staying this proceeding pending arbitration was correct and should be sustained.

Respectfully submitted,

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Appeal from the United States District Court, Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

THE ISSUES.

Appellees, in their Brief, argue questions which are not the crucial issues in this case. Their argument (except for their discussion of our "waiver" point) revolves around two questions, set forth on page three of their Brief, which we summarize as follows:

1. When a contract provides for arbitration of any disagreement under it, and one party sues for declaratory relief and for an injunction *against arbitration*,

should not the action be stayed under the United States Arbitration Act?

2. When, in such a contract, the arbitration clause contains a proviso saving the right to "injunctive relief to prevent irreparable injury by reason of a claimed breach", *does a request by one party for arbitration constitute irreparable injury within the meaning of such proviso?*

We respectfully urge that these are not the questions determinative of this case.

The first stated question is not at all before the Court, because it assumes a state of facts not existing here—that is to say, rather, that it assumes that the facts stated are *all* the facts; which is not the case. True, we have here a clause providing for arbitration of all disputes; *but that is not the whole clause.* True, we have here an action which seeks a declaratory judgment against proceedings in arbitration; *but that is not the gravamen of the action.* That is merely relief which appellants seek incidentally, as a part of their main cause of action. If we limit the facts to those stated by appellees in their first point, the answer would have to be that the stay was proper. We have never contended to the contrary. But that is a point which is moot here.

The point is, whether the stay was proper where the arbitration clause contains a proviso saving the right to injunctive relief; where the injunctive relief sought is against a breach by the other party which would result in irreparable injury.

This brings us to the second question stated by appellees. This question also assumes facts which do not exist—that is to say, it assumes incorrectly that appellants' action is brought to enjoin arbitration proceedings *on the theory that a request for arbitration constitutes irreparable injury.* We have never asserted that.

What we do assert is that when the arbitration clause contains such proviso saving the right to injunctive relief against a breach resulting in irreparable injury; and when one party insists on compliance with his interpretation of a disputed provision, pending and in spite of arbitration, the other party is entitled, under such proviso, to sue for an injunction to prevent his adversary from canceling or rescinding or refusing further to perform, where such cancellation or rescission or refusal would cause irreparable injury; and that as one incident to the equitable relief of such an injunction, the Court may be asked in such action to declare the rights of the parties; and that as another incident, it may ask the Court to enjoin attempts to compel arbitration, *since, in such a case, by the terms of the proviso, there is no right to compel arbitration.*

But we have never contended that the mere request for arbitration is in itself the primary cause of irreparable injury. What we do say is that once appellants bring themselves within the proviso, they at the same time take themselves out of the general arbitration provision; in which event, to compel them to sub-

mit to arbitration in a situation in which they have not agreed to be bound by it is in itself a doing of irreparable injury, by depriving them of their day in Court. That, however, is incidental to, and a consequence of, the facts which initially take appellants out of the general arbitration clause and bring them within the proviso. See Brief for Appellants, pages 34-36, Argument III-H.

THE ARGUMENT.

1. We do not quarrel with appellees' contention that without the proviso saving the right to injunctive relief, the stay of proceedings would be proper. That, however, is not the question, for the proviso is there, and it means something, and its meaning must be given effect.

2. Appellees say that the proviso saving the right to injunctive relief does not apply to a controversy as to interpretation of the meaning of a clause in the contract. And why not? If a dispute as to such meaning puts appellants in reasonable fear of an unjustified refusal of further performance by appellees; and if such unjustified refusal would result in irreparable injury to appellants: then what clearer case is there for the injunctive relief provided for in the saving clause? The questions for decision in such a case will be: (1) Are the appellants in reasonable fear of such refusal of performance by appellees; and (2) would such refusal be unjustified; and (3) would it

result in irreparable injury to appellants. The question whether such refusal was unjustified would depend squarely on the interpretation of the contract. How then, could the Court in such an action for injunctive relief fail to be called on to interpret the contract? We cannot imagine any action for the injunctive relief mentioned in the proviso saving the right thereto, that would not involve some interpretation of the meaning of the contract at some point.

3. Appellees say, at page 11 of their Brief, that the proviso saving the right to injunctive relief clearly appears to mean that if one of the parties seeks to rescind, or refuses further to perform the contract on account of a claimed breach, the other party is not barred, if it can bring itself within the equitable rules relating to injunctions, from seeking to prevent such rescission or non-performance, *pending the determination of the controversy in arbitration proceedings.*

If we correctly understand appellees' argument in this connection, they are saying in effect: "You may sue in equity to enjoin us from wrongfully refusing to go on with performance, if you can make out your case, *but, even so, the only thing the Court can do in such a case is to give a temporary injunction against such rescisson or non-performance, while arbitrators are determining the merits of the matter.*" Even if such an equitable action can be brought, it only holds matters *in statu quo* while arbitration is proceeding. That is what we understand appellees to mean by their argument.

We reply, first, that if appellees are right in this view of the matter, they have cut the ground from beneath themselves so far as their claim of right to a stay is concerned. If that is their view, and if it is a correct view, then the issue is whether the appellants have made out a case for an injunction, and an application for a stay was not the way to test that. Indeed, the granting of the stay makes it impossible to test that question. On the proceedings for a stay, the only ultimate question is whether the parties have agreed in writing to arbitrate. If, however, the appellants are correct in saying that the proviso gives the right to an injunction in a proper case *pending arbitration,* then the granting of the *stay* pending arbitration shuts off the appellants from the chance of establishing the very right which appellants' argument admits they may establish if they can.

Secondly, we reply that it is strange doctrine to say that a court of equity can be limited by contract to the mere policing task of holding matters *in statu quo,* while arbitrators declare the rights of the parties. True, under the Arbitration Act, the parties can, by their agreement, *exclude themselves* from access to the Courts by binding themselves to submit to a conventional arbitration tribunal. But that is a far cry indeed from saying that the parties can by contract *restrict the power of the Court, once they get into it.* If their contract has left them free, in any case or under any circumstances, to ask a court of equity for the relief which courts of equity traditionally give, then we find it difficult to believe that their contract may provide further that the Court may do only

certain restricted things. The power of a court of equity, once it has taken jurisdiction of a matter, to give all the relief and decide all the questions necessary under the exigencies of the case, is traditional and unquestionable. It is one thing to say that the parties may contract *themselves* out of the right of entering such a Court; but it is quite another to contend that they may contract *the Court* into a restricted sphere of action, once they get into it.

4. The appellees do not agree with our suggestion that the general arbitration clause contemplates something in the nature of appraisal, rather than true arbitration. That suggestion of ours was made as a possible solution of the problem of reconciling the sweeping general language of the first portion of the arbitration clause with the apparently inconsistent and contradictory language of the proviso saving the right to injunctive relief. We were attempting to follow the rule of construction of contracts, mentioned in appellants' Brief, requiring that, if reasonably possible, conflicting provisions in a contract be reconciled. It seemed, and now seems to us, that by treating the general arbitration provision, despite its sweeping language, as a provision for mere fact finding, appraisal or measurement by so-called arbitrators, the two contradictory provisions could be brought into reasonable reconciliation.

Appellees make no suggestion concerning the meaning of the proviso or its reconciliation with the general provision, other than the one on page 11 of their Brief, next above discussed by us, in which they suggest that a party is not barred from seeking injunctive relief

if it can, pending the determination of the controversy in arbitration. For the reasons above stated, we think appellees' suggestion is as open to objections as ours, if not more so.

Maybe the conflicting provisions will have to be reconciled on some other basis which has not occurred to appellees' counsel or ourselves.

Of this, however, we feel confident: that proviso, saving the right to seek injunctive relief, meant something. Appellees themselves say it was explained by appellants' negotiator as contemplating a case where the seller might "divert the cedar logs" (that is, refuse further deliveries). Wherever such a case arises or is threatened, it seems to us, in all reason, that arbitration is no longer the compulsory remedy.

5. Appellees argue that they have not waived the right to arbitration (assuming that they otherwise would have been entitled to insist upon it). In this argument they emphasize the "default-in-arbitration" cases; and dismiss the two cases cited by us on waiver by inconsistent acts, as being not in point. Of course, we do not claim that appellees are in default in arbitrating in the sense that they have ever expressly refused to arbitrate after being asked to do so. The authorities cited by us in this connection were intended to illustrate that *conduct* inconsistent with arbitration can deprive a party of the right to insist on it. That conduct may consist of delay (as in the case of *La Nacional Platanera S.C.L. v. North American Fruit & Steamship Corporation*, C.C.A. 5th, 84 F. (2d) 881, to which appellees devoted considerable dis-

cussion to show its dissimilarity to this case. We did not cite it as a case similar in its facts, but to illustrate the principle that certain kinds of conduct may deprive a party of the right to arbitration); seeking a remedy inconsistent with arbitration (as in *Young v. Crescent Development Co.*, 240 N.Y. 244, 148 N.E. 510); or refusing to leave matters *in statu quo*, pending arbitration (as in *Winsor v. German Savings & Loan Society*, 31 Wash. 365, 72 Pac. 66). The case last cited is most similar to the present situation, because the letter from appellees' counsel "insisting" that payments be kept up by appellants pending arbitration, was tantamount to a refusal to leave matters *in statu quo* because it carried an implicit threat of reprisal if the payments were not so made.

6. Finally, we wish respectfully to point out that the authorities cited by appellees, while some of them contain sweeping and strong language (notably the *Shanferoke* case, 293 U.S. 449, 55 Sup. Ct. 313, 79 L. Ed. 583), are cases of general, unlimited arbitration clauses, containing no proviso saving the right to injunctive relief, as does the provision before the Court here.

Dated, Oakland, California.
March 22, 1950.

Respectfully submitted,
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